(24,895)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 230.

THE CUDAHY PACKING COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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6 STATE OF MINNESOTA,
County of Ramsey, ss:

I hereby certify and return, That at the City of St. Paul, County and State aforesaid, on the 6th day of November A. D. 1913, I served the Summons and Complaint hereto attached upon the within named The Cudahy Packing Company, a corporation, personally, by handing to and leaving with Moritz Heim, Authorized Agent to accept service of process a true and correct copy thereof.

Dated this 7th day of November 1913.

Sheriff's Fee Service.....	$1.00
Copy	$....
Travel	$ .20
	$1.20

JOHN WAGENER,
Sheriff of Ramsey County, Minn.,
(Signed) By ABBOTT RODENBERG, *Deputy.*

1 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, Defendant.

Summons.

The State of Minnesota to the Above-named Defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at
2 their office in the city of St. Paul, in the said County of Ramsey, State of Minnesota, within twenty (20) days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of Two Thousand One Hundred Eleven Dollars and Ten Cents ($2,111.10) taxes and Six Hundred Twenty Six Dollars and Eighty-One Cents ($626.81) accrued penalties up to the day of the commencement of this action, together with the costs and dis-

bursements herein and such further penalties and interest as may accrue prior to the entry of judgment herein.

Dated this 3d day of November, 1913.

LYNDON A. SMITH,
Attorney General;
WILLIAM J. STEVENSON,
Ass't Attorney General,
Attorneys for the State, the Capitol,
St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Complaint.

The State of Minnesota for its complaint against the defendant in the above entitled action alleges:

I.

That the defendant during all of the times herein mentioned has been and now is a corporation created, organized and existing under the laws of the State of Illinois and duly licensed to do business within the State of Minnesota as a foreign corporation under the provisions of Sections 2888 and 2890, inclusive, of the Revised Laws of 1905 as amended.

II.

That the defendant during all of said time was engaged in the business of operating railroad cars, not otherwise listed for taxation in Minnesota, for the transportation of freight over railway lines in whole or in part within the State of Minnesota, which lines were not owned, leased or operated by the defendant and which cars were termed variously, to-wit: "refrigerator cars," "oil cars," "produce cars," and by other names, and said cars were used in groups or classes and the cars in such groups or classes were marked, designated, known, sent out, and kept track of by various names, such as Cudahy Refrigerator Line, Cudahy Oil Tank Line, Cudahy Refining Company, and Cudahy Produce Refrigerator Line; that in connection with the operation and management of said cars, said defendant had within said State various ice houses and icing stations, stationary oil tanks, and other real property, and in addition to said cars had other personal property permanently and continuously kept and used within the State of Minnesota as a part of its business of operating said freight lines; that all of the cars herein mentioned were either kept

and continually used in the transportation business of said freight line company within the State of Minnesota, or were periodically, regularly and habitually within said State in passing through, into or out of the State in such transportation business of such
4 freight line company; and that all of the earnings of said defendant from business beginning and ending within the State and a proportion, based upon the proportion of mileage over which such business was done, of earnings on all interstate business passing through or into or out of the State, and that all of said earnings were from the operation of such freight car lines within Minnesota, that the cars operated by the defendant during all of the times herein mentioned were substantially uniform in style, character and value in each of said freight car lines respectively, and that all of the cars of the defendant being operated in Minnesota either in State traffic or in interstate business passing through or into or out of the State in the Cudahy Refrigerator Line were substantially alike in value and character, and that the same is true of each of the other so-called freight car lines operated by the defendant, as herein stated; that during each calendar month of the time herein mentioned the defendant, for practically all of such month, had substantially the same number, character and value of cars being operated by it within the limits of the State of Minnesota, although the identity of the particular cars so within Minnesota changed from day to day in the ordinary transaction of the business of such freight line company; that the defendant had at all times substantially the same number of cars within said State and continuously and constantly used there that portion of its property, together with the other property herein mentioned; that defendant during all of the times herein mentioned was a freight line company as defined by
5 the Statutes of the State of Minnesota, and particularly Chapter 250 of the Laws of 1907.

III.

That during all of the years 1907, 1908, 1909, 1910, 1911 and 1912 the defendant so operated such freight car lines in the State of Minnesota, and during each of said years it reported to the State of Minnesota only a portion of its earnings from the operation of said freight cars, and that a large portion of its earnings for each of said years was not reported by said company as required by said law of 1907, or otherwise, and that during all of said years the defendant failed and neglected to furnish a true and just return of its said gross earnings, as provided by law, in this that it has failed and neglected to report the amounts designated as "omitted" which are tabulated in detail in the schedule hereto annexed and marked "Exhibit A" and hereby made a part hereof, and that the amounts of such earnings reported each year are as set forth in said "Exhibit A" and designated "reported"; that the taxes due from said company for each of said years upon the property of the defendant so used within the State of Minnesota and so devoted to said business is

the amount set forth and designated as "tax" in said "Exhibit A," calculated upon said omitted earnings and upon the partial earnings reported by the defendant; that for the year 1911 the defendant reported its entire earnings, so far as the plaintiff is now advised; that for the years 1907 and 1908 the taxes due from said company upon its property within Minnesota, as aforesaid, accrued
6 upon the basis of four per centum (4%) of said gross earnings, and that for each of the years thereafter said taxes accrued upon the basis of six per centum (6%) of said gross earnings, as provided by Chapter 473, Laws of 1909; that the time when demand was made upon the defendant for the payment of the taxes so accruing for each of said years, calculated upon said reported earnings and upon said omitted earnings, is set forth in the appropriate column marked "demand" in said "Exhibit A," and that the penalty for non-payment thereof, calculated up to the time of the commencement of this action, is set forth in the column of said "Exhibit A."

IV.

That the defendant has never paid any of said taxes so set forth in said "Exhibit A" nor any part thereof, nor any of the penalties accruing because of the non-payment thereof; that the only taxes paid by the defendant under the provisions of said Laws of 1907 and of 1909 were the taxes calculated upon the earnings voluntarily reported by the defendant for the years 1908 and 1912, as shown on said "Exhibit A."

V.

That the facts as to all of said omitted earnings contained in said "Exhibit A" were obtained by the Public Examiner of Minnesota from examinations made by him in the conduct and management of his said office, and that the Minnesota Tax Commission during all of said years, after having said omitted earnings
7 certified to it by said Public Examiner and said partial reports of earnings reported by defendant, duly levied the tax against the defendant upon its property in Minnesota in the sums set forth in said Exhibit, and that immediately upon such tax being so levied and reported, the State Auditor made his draft upon such freight line company for the amount of said taxes upon such earnings so reported or so ascertained, and placed such draft in the hands of the State Treasurer for collection, and that all of the sums mentioned in said "Exhibit A" still remain due and payable to the State of Minnesota.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Two Thousand One Hundred Eleven Dollars and Ten Cents ($2,111.10) taxes and Six Hundred Twenty Six Dollars and Eighty-one Cents ($626.81) accrued penalties up to the day of the commencement of this action, together with the costs and dis-

bursements herein and such further penalties and interest as may accrue prior to the entry of judgment herein.

LYNDON A. SMITH,
Attorney General;
WILLIAM J. STEVENSON,
Ass't Attorney General,
Attorneys for the State.

STATE OF MINNESOTA,
County of Ramsey, ss:

Lyndon A. Smith being duly sworn says that he is the Attorney General of the State of Minnesota, and that he has read the
8 foregoing complaint and that to the best of his knowledge and information said complaint is true.

LYNDON A. SMITH.

Subscribed and sworn to before me this 3d day of November, 1913.

[NOTARIAL SEAL.] EDITH GRAHAM,
Notary Public, Hennepin County, Minnesota.

My commission expires March 18, 1916.

"EXHIBIT A."

Showing Earnings of the Cudahy Packing Company, Both Reported and Omitted, for the years 1907, 1908, 1909, 1910, 1911, and 1912, with tax and penalties, as per chapter 250, Laws of 1907, and Chapter 473, Laws of 1909.

Year.	Rate.	Earnings.	Tax.	Demand.	Penalty.
1907 Reported.....	4%	$2,403.66	$96.15	Feb. 24, 1908	$63.72
Omitted.....	4%	3,159.32	365.69	Jan. 20, 1910	160.90
1908 Omitted.....	4%	5,982.87			
Reported.....	4%	433.32	Paid.		
1909 Reported.....	6%	705.35	42.32	Feb. 4, 1910	18.62
Omitted.....	6%	6,530.65	391.84	May 18, 1910	160 64
1910 Reported.....	6%	656.18	39.37	Feb. 27, 1911	12.20
Omitted.....	6%	6,400.57	384.03	Apr. 10, 1911	111.36
1911 Reported.....	6%	7,159.96			
		2.62	Int. 432.22	Mar. 29, 1912	77.80
1912 Reported.....	6%	1,027.91	Paid.		
Omitted.....	6%	5,991.34	359.48	Mar. 26, 1913	21.57
			$2,111.10		$626.81

Endorsed: Filed Dec. 31, 1913, Matt Jensen, Clerk, by G. A. Johnson, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Answer.

Now comes the above named defendant and makes its answer to the complaint herein as follows:

9 1. Except as hereinafter admitted, the defendant denies each and every allegation of the complaint.

2. The defendant admits that during all of the times mentioned in the complaint it has been and now is a corporation organized and existing under the laws of the State of Illinois, and duly licensed to transact business within the State of Minnesota.

3. The defendant denies that at any time it has been or now is engaged in the business of operating railroad cars either as alleged in the complaint or otherwise. In this connection the defendant alleges that it is the owner of certain refrigerator cars which are designated by the arbitrary names, "Cudahy Refrigerator Line," "Cudahy Produce Refrigerator Line," and "Cudahy Oil Tank Line." Such cars are leased by the defendant to various railroad companies and are used by the defendant in shipping its products from its various packing plants at Sioux City, Iowa, Kansas City, Missouri, and South Omaha, Nebraska, to selling agencies and branch houses located at different points throughout the country, including the following points in the State of Minnesota: St. Paul, Minneapolis and Duluth.

Hereto attached marked Exhibit A, and made a part hereof is a true and correct copy of the Articles of Incorporation of the defendant.

4. During the period of many years it has been customary for shippers whose products call for special types of cars such as refrigerator cars, oil tank cars and coal cars, to own and lease to the various railroad companies over whose lines such products are shipped,
10 such cars. This custom has grown up solely because of the fact that the railroad companies have failed to furnish these special types of cars for the shipment of the products in question in sufficient quantities to enable the business of such shippers to be conveniently and expeditiously carried on, and for the further reason that if the shippers own substantially the number of cars equivalent to their necessities, this prevents a duplication of the large investment necessary by each of the transportation companies which may be called upon from time to time to haul the cars. The cars so furnished by such shippers are used by the railroad companies on exactly the same basis as cars owned by such companies, save and

except that the compensation is paid to the owner of the car on a basis of a certain rate per mile traveled, which differs in different parts of the United States and as between different classes of cars. The arrangement between the carrier and the shipper so furnishing the cars is in effect a lease of the cars to the carrier upon such terms as to require the carrier to pay a rental for the use of the cars as above stated. While the cars are in the hands of the carrier the shipper or owner has no control whatever over their movement and operation. They are in all respects, so far as operation is concerned, treated as other equipment owned and operated by the carrier. All of the cars owned by the defendant and involved in this action are and during all of the times mentioned in the complaint have been owned and operated in the manner and pursuant to the custom hereinabove stated.

5. The Cudahy Refining Company mentioned in the complaint is a distinct corporation, and has no connection with the de-
11 fendant. Its cars are not owned or operated by the defendant nor are they used in carrying any of the defendant's products.

6. The defendant admits that the cars owned and used by it in the shipment of its products into and within the State of Minnesota are of substantially the same type, but alleges that such cars vary in value, such value being determined largely by the length of time in which the cars have been in use. Such cars used in Minnesota and belonging to the defendant vary from $700 to $900 each, depending upon their age and the length of time they have been in service.

7. The defendant specifically denies that it owns or controls any ice-houses or icing stations or stationery oil tanks in the State of Minnesota, or that it owns any property within the State of Minnesota, which is used in connection with the operation of its said cars. The business of the defendant within the State of Minnesota consists exclusively in the marketing of its packing-house products, and for that purpose the defendant maintains and operates the branch houses above mentioned at St. Paul, Minneapolis and Duluth; and the only connection which said branch houses have with said cars is that upon arrival upon tracks adjacent to said branch houses, the product contained in the cars is promptly unloaded and the empty car then immediately hauled away by the railway company for return to the point of origin.

8. The sole revenue derived by the defendant from said cars during all of the times mentioned in the complaint has been and now is the rentals received from the railway companies based upon
12 the mileage made by said cars, and the defendant has never at any time derived any income from said cars arising from operation or transportation. Except that defendant occupies and has occupied the relation of lessor to the railway companies, so far as the cars are concerned, the relation between the defendant and such companies has been and is during all of the times mentioned, exclusively that of shipper and carrier. All arrangements between the defendant and the carriers for the leasing of the cars are and have at all times been made at the points outside the State of Min-

nesota, and all rentals paid by the carriers to the defendant, including rentals based upon mileage made by cars in Minnesota, have at all times been paid to the defendant in the course of settlement made at points outside the State of Minnesota.

Substantially 90% of the mileage made in Minnesota by cars owned by the defendant and leased to railroad companies as aforesaid during all of the times mentioned in the complaint, is made in the course of interstate transportation. The remaining 10% of such mileage has been made during said time in intrastate transportation.

The entire mileage, both interstate and intrastate, is and has been made up substantially of the following car movements:

A. From packing houses outside Minnesota to branch houses within the State of Minnesota, 11 cars per week.

B. From packing houses outside the State of Minnesota to branch houses beyond Minnesota involving transportation through Minnesota, 4 cars per week.

13 C. On so-called "peddler cars" loaded at Minnesota branches and consigned to points within Minnesota, 5 cars per week.

The average number of cars per day owned by the defendant and operated by the various railway companies in Minnesota has not exceeded during any of the times mentioned in the complaint the following for all three classes of business above indicated:

During the year 1907, 10 cars.
During the year 1908, 11 cars.
During the year 1909, 12 cars.
During the year 1910, 12 cars.
During the year 1911, 12 cars.
During the year 1912, 12 cars.

9. The rental received by the defendant from the railway companies for the use of its said cars during all of the period covered by the complaint herein has been at the rate of one cent per mile per car for each mile of travel of the car, both loaded and empty. The figures reported by the defendant to the State of Minnesota as earnings for the years 1907 to 1912 inclusive comprise the rentals so received based upon strictly intrastate mileage, with the exception of the year 1912, for which year the defendant reported its rentals derived from all mileage made by its cars in Minnesota, both interstate and intrastate. In each of the said years 1907 to 1912 inclusive, the report of earnings was made under protest with the statement that the defendant was not a car line company within the meaning and operation of the law under which the tax was undertaken to be assessed and collected. Exhibit A, attached to the complaint includes a correct statement of the earnings

14 reported by the defendant during the years above mentioned.

The earnings appearing upon said Exhibit A as omitted earnings include rentals received by the defendant from the railway companies for the use of its cars based upon certain figures of mileage furnished by the various transportation companies to the Public Examiner, which are taken from the transportation com-

panies' records and pro-rated arbitrarily to the State of Minnesota on some basis as to the correctness of which defendant is not advised, but which purports to represent the rentals derived from the Minnesota proportion of the interstate mileage made by said cars coming into and running out of and going through Minnesota. The said figures of omitted earnings appearing in said Exhibit A include, however, rentals derived from the mileage of Cudahy Refining Company, as reported by said railway companies, none of which rentals for such mileage belonged to or were received by the defendant, and none of the cars making such mileage were owned by the defendant. The extent of such mileage of the Cudahy Refining Company cars represented by so-called omitted earnings in said statement Ehibit A the defendant has no means of ascertaining.

10. The defendant specifically denies that at any time during the period covered by the complaint it has been or is a freight line company or a car line company as defined by Chapter 250 of the Laws of 1907 as amended by Chapter 473 of the Laws of 1909, or as defined by Chapter 377 of the Laws of 1911, or by any other statute of the State of Minnesota.

15 11. During all of the said period covered by the complaint defendant paid to the various transportation companies operating and transporting said cars the full tariff freight rates upon all the products owned by defendant and transported in said cars, and the same were and are included in the total gross earnings derived from the operation of said cars in Minnesota, both interstate and intrastate, which were in each of said years duly reported for taxation by the several railway companies over which and by which said cars were operated in Minnesota, and the said railway companies were duly assessed and paid taxes upon said earnings under and pursuant to the terms of the gross earnings tax law of the State of Minnesota applicable to railway companies, to-wit: Chapter 253 of the General Laws of Minnesota for 1903, Section 1003 to 1011 inclusive of the Revised Laws of Minnesota for 1905.

The defendant further answering, alleges that the payment by said railway companies as aforesaid, of the tax upon the gross earnings derived from the operation of said cars operated pursuant to the provisions of the said gross earnings laws applicable to railway companies was in law and in fact a tax upon said cars, and that the taxes so paid by said railway companies upon said gross earnings arising from the operation of said cars were in lieu of all taxes and assessments upon said cars so operated by said railway companies, including the cars owned by the defendant and leased to said railway companies.

12. During all of the said period covered by the complaint the defendant has owned both real and personal property situ-

16 ated within the State of Minnesota and used in connection with its said business of marketing packing-house products. The defendant has during all of said time maintained branch houses at St. Paul, Minneapolis and Duluth, and has been duly assessed

for its real and personal property at said points and has paid taxes thereon as follows:

Year.	St. Paul. Real.	St. Paul. Personal.	Minneapolis. Personal.	Duluth. Personal.
1907	$114.85	$234.82	$190.99	$193.51
1908	94.99	211.90	648.45	162.44
1909	103.04	.....	277.50	150.80
1910	105.29	.....	294.47	174.88
1911	642.40	223.44	257.99	171.54
1912	644.60	153.09	138.60	191.54

Notwithstanding the payment of real and personal property taxes as aforesaid, and notwithstanding the repeated protests of this defendant, the state officials charged with the duty of assessing and collecting taxes upon freight line companies have with full knowledge of the payment of such real and personal property taxes insisted upon classifying the defendant as a freight line company, and from year to year assessing the taxes claimed in this action.

13. The defendant alleges that the taxes sought to be collected in this action are not in lieu of all taxes upon its property, and that the said taxes demanded for each of the years mentioned in the complaint do not constitute a fair or reasonable equivalent for the usual and proper tax upon the property of the defendant otherwise subject to taxation in Minnesota; that the earnings sought
17 to be taxed in this action are not taxable in any event, for the reason that they were derived from the carrying on of interstate commerce, and any attempt to tax the same constitutes an unwarranted interference with and burden upon such commerce contrary to the provisions of the Constitution of the United States.

14. The defendant alleges that during the years covered by the complaint the average rate of taxation applicable to personal property throughout the State of Minnesota has been as follows:

1907	25.81 mills
1908	26.98 mills
1909	27.79 mills
1910	27.92 mills
1911	29.67 mills
1912	27.74 mills

During all of said years it has been the universal custom and practice of all officials, both state and local, charged with the duty of assessing and collecting personal property taxes, to assess such property at not more than sixty per cent of its full and actual value; that the taxes sought to be assessed and collected in this action for each of the years above mentioned are in excess of sixty per cent of the actual cash value of the cars of defendant on the average constantly in use within the State of Minnesota, as hereinbefore alleged, and are in fact more than double the taxes which would have been properly collectible from the defendant had the rules

of assessment and taxation applicable to other personal property throughout the state been applied, and consequently amount
18 to more than the ordinary tax upon property or a just equivalent therefor ascertained by reference thereto. The defendant alleges that the action of the state authorities in seeking to assess and collect the said taxes herein involved is not an exercise in good faith of the legitimate taxing power of the state; that it involves a manifest attempt to burden the conduct of interstate commerce; that it is a denial to the defendant of the equal protection of the laws, and is a deprivation of its property without due process of law—all contrary to the provisions of the Constitution of the United States.

Wherefore, the defendant asks that the State take nothing by its complaint herein, and that it be hence dismissed with its reasonable costs and disbursements.

DAVIS, KELLOGG & SEVERANCE, AND
THOMAS CREIGH,
Attorneys for Defendant.

Endorsed: Filed April 14, 1914, Matt Jensen, Clerk, By G. A. Johnson, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Reply.

Now comes the above named plaintiff and for its reply to the answer of the defendant herein denies each and every allegation, matter and thing in said answer contained, except as heretofore alleged in plaintiff's complaint and admitted in said answer.

LYNDON A. SMITH,
Attorney General,
WILLIAM J. STEVENSON,
Ass't Attorney General,
Attorneys for the State of Minnesota.

19 Endorsed: Filed April 14, 1914, Matt Jensen, Clerk, by G. A. Johnson, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

This cause came duly on and was tried in said court at the April, 1914, general term. Lyndon A. Smith, attorney general, and William J. Stevenson, assistant attorney general, appeared as attorneys for plaintiff, Messrs. Davis, Kellogg & Severance appeared as attorneys for the defendant, whereupon the parties, by their respective attorneys, agreed upon the facts in the case and reduced them to writing and agreed that the same should constitute a statement of facts, and that said statement comprises all the facts relative to this cause and they are all the facts and shall be considered as the evidence therein. That said statement of facts is hereto attached, made part hereof and marked Exhibit 1.

Now, upon the admissions in the pleadings and said statement of facts the Court finds as conclusions of fact:

1. That all the facts set forth in said statement of facts are true.
2. That all the allegations of fact in the pleadings and exhibits thereto attached are true in so far as they conform to and accord with said statement of facts.
3. That all the allegations of fact in the pleadings which do not conform to and accord with said statement of facts are not sustained by the evidence and are found not true.
4. That defendant during all the times mentioned in the complaint was a freight line company as defined by the statutes and laws of the State of Minnesota.

From the foregoing facts the Court finds as Conclusions of Law:

1. That defendant at all the times referred to in the complaint was a freight line company as defined by the statutes and laws of the State of Minnesota.
2. That there is now due and owing the State of Minnesota from defendent Cudahy Packing Company for taxes duly levied by plaintiff against defendant upon its property in the State of Minnesota the sum of $2,111.10 and $625.81 accrued penalties to the date of the commencement of this action, besides such further penalties and interest as may accrue prior to the entry of judgment herein, together with its costs and disbursements of this action.

Let judgment be entered accordingly.

Dated Sept. 15, 1914.

OLIN B. LEWIS,
District Judge.

A stay of forty days is granted.

LEWIS, *J.*

Memorandum.

Defendant is extensively engaged in the manufacture and sale of meat products and owns certain refrigerator cars in the State of Minnesota. Defendant uses them in transporting its meat products on railway lines now owned, operated or leased by defendant. Defendant pays the railway company regular freight rates for
21 transporting such products in defendant's refrigerator cars.

On the other hand, the railway company pays defendant one cent per mile for every mile defendant's cars travel while transporting defendant's products and while returning the car to defendant. The railway company also has the right to carry other freight in such cars on the return trip, at regular tariffs.

In brief, defendant owns property in the form of refrigerator cars in Minnesota which are used to a large extent in connection with the defendant's business. Defendant receives an income from this property of one cent for every mile such cars travel, going or coming, over the railroad hauling them.

The railway company reports and pays a tax based in part upon its gross earnings from such cars. Defendant pays no tax on its cars.

Under the law, freight line companies are subject to taxation on a gross earnings basis. The State claims defendant is a company of the kind to which the law applies, and seeks to recover such taxes. Defendant disputes this claim and denies the liability.

The right of the State to regard as proper subjects of taxation the cars of a foreign corporation regularly and constantly in the state, is upheld in the case of the Pullman Palace Car Co., 141 U. S. 18, Union Refrigerator Transit Co., 177 U. S. 152.

The right of the State to tax the property of a freight car company within the state by measuring the value of such property by the gross earnings on both interstate and intrastate business,
22 is upheld in U. S. Exp. Co., vs. Minnesota, 223 U. S. 335.

The question here presented, therefore, narrows down to the inquiry: Is defendant a freight line company operating cars in the state within the meaning of the laws of Minnesota? If so, it is liable for this tax.

A freight line company is defined in Chap. 250, Laws 1907, in substance, as any corporation * * * engaged in the business of operating cars not otherwise listed for taxation in Minnesota, for the transportation of freight * * * over any railway line or lines, in whole or in part within this state, such lines not being owned, leased or operated by such company, whether such cars be termed * * * refrigerator cars or by some other name. The Act further required the officers of such freight line company to file with the state auditor a statement of gross earnings received from the operation of such cars, and makes it the duty of the auditor to proceed to collect a tax on the basis of four per cent of such earnings.

Chap. 97, Laws 1909, amends this Act in minor details.

Chap. 473, Laws 1909, changes the tax rate from four per cent to six per cent.

Chap. 373, Laws 1911, apparently supersedes the Act of 1907 as

amended, and, while in some respects more specific, in substance covers the same field.

It is true that in a sense the railroad company is a lessee of such cars. The leasehold interest of the railway company is, however, abridged and limited. Defendant keeps these cars primarily in the business of transporting its meat products. Defendant
23 controls the movement of the cars during all of the time they are loaded with defendant's freight. Defendant fixes the destination and routes the cars. When unloaded, the cars must be returned as directly as may be to defendant at the place of original shipment for another load of defendant's merchandise. Incidentally the railroad may use the cars for other freight, on the return trip only, but without defendant's consent the railroad company may not divert the cars to other points or for other purposes. The railroad company cannot give the car greater mileage movement when unloaded than when loaded with defendant's freight, and the defendant may direct the movement of the unloaded car upon payment of regular transportation tariffs for an empty car. Defendant has certain control and dominion over the cars, and in that sense may be said to operate them.

Defendant has a property interest in these cars while being operated in its business and used on the railroads in Minnesota, from which it derives earnings in the form of car mileage at the rate of one cent per mile. These cars also earn freight receipts for the railroad company.

Upon the evidence in this case it is my conclusion,

1. That defendant comes within the definition of a freight line company as defined by the state laws, and its property in the state is subject to taxation on a gross earnings basis.

2. The fact that the railroad companies have paid taxes upon gross earnings based in part upon revenues derived by them for hauling freight for defendant in these cars does not constitute
24 double taxation and does not deprive the State of the right to tax his property of defendant upon a gross earnings basis as belonging to a freight line company operating cars within the state.

LEWIS, *J.*

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

EXHIBIT "1."

Stipulation of Facts.

It is hereby stipulated, subject to the right of either party hereby reserved to object to any part thereof on the ground of immateriality,

that the following statement of facts comprises all of the facts in relation to the above entitled cause, and that said facts are and shall be considered as the evidence therein. This stipulation is intended as a statement of facts merely, and no language herein contained shall be deemed binding upon either party as to the legal effect of the facts stated.

I.

The defendant, during all of the times mentioned in the complaint, has been and now is a corporation duly organized and existing under the laws of the State of Illinois, and duly licensed to transact business within the State of Minnesota. Hereto attached, marked "Exhibit A" and made a part hereof, is a true and correct copy of the Articles of Incorporation of the defendant. The general nature of the defendant's business at all of the times mentioned in the complaint has been and is that expressed in its said Articles of Incorporation. The defendant owns and operates packing plants for the slaughter of live stock and the packing of products thereof at Sioux City, Iowa, Kansas City, Missouri, and South Omaha, Nebraska. For the purpose of disposing of its packing-house products, the defendant maintains a principal office at the City of Chicago, in the State of Illinois, and a large number of selling agencies or branch houses located at various points throughout the United States. It has three such branch houses in Minnesota, to-wit: at St. Paul, at Minneapolis and at Duluth. These branch houses, including those in Minnesota, are establishments from which packing-house products are marketed at wholesale in the respective cities where they are located and in the adjoining territories. They are each in charge of a local manager and have facilities and equipment appropriate for the receiving, refrigerating and delivery to retailers of packing-house products. The defendant owns the building and the land on which its said business is carried on at St. Paul, Minnesota, but transacts its business from leased premises in Minneapolis and in Duluth, Minnesota. At the St. Paul branch house the defendant has facilities for smoking and curing meats, and some, but not all, of the meat products shipped to said branch house in St. Paul are there smoked and cured before they are marketed either locally or by re-shipment in the so-called peddler cars hereinafter mentioned. At all three of said branch houses the defendant has facilities for keeping meat products under refrigeration.

II.

During all of the times mentioned in the complaint and for many years prior thereto, the defendant owned cars known as "refrigerator cars" or "produce cars" which were used in groups or classes designated and kept track of under various names, such as "Cudahy Refrigerator Line," "Cudahy Produce Refrigerator Line" and "Cuhahy Car Line." These cars so owned were during all of said time used by the defendant, as hereinafter more particularly stated, for the shipment of its own freight over lines of railway situated in whole

or in part within the State of Minnesota, which lines were not at any time owned, leased or operated by the defendant.

During all of said time mentioned in the complaint, and long prior thereto, it was (and still is) customary for shippers such as the defendant, whose products called for special types of cars, such as refrigerator cars, oil tank cars and coal cars, to own and lease such cars to the various railway companies over whose lines their products are shipped. This custom has grown up partly by reason of the fact that the railway companies have failed to furnish these special types of cars for the shipment of the particular products in sufficient quantities, and at the particular times necessary to enable the business of such shippers to be conveniently, economically and expeditiously transacted. The ownership by each shipper or class of shippers of the peculiar type and substantially the number of cars adapted to his necessities has been found by experience to secure the best practical results for the shipper and for the railroad company.

27 The railway companies pay to the owners of the cars (including this defendant) for the use thereof a rental based upon a fixed rate per mile traveled by each car, which rate varies in different parts of the United States, and as between different classes of cars. However, with respect to the State of Minnesota and all other states included in what is commonly known as the Western Freight Classification and with respect to Western Trunk Lines or Western Railways, such refrigerator cars, including those of the defendant, are handled upon the terms and conditions contained in Western Trunk Lines Circular No. 1-J, and particularly in what is known as Rule No. 2630, which is as follows:

"Rule No. 2630.

The compensation allowed for use of foreign railroad freight equipment is as follows:

Private Cars.—Freight cars owned by individuals, firms or car companies which are accepted by (each of the railroads concerned in this action) for transportation over its lines, will be paid for at the following rate for both loaded and empty movement:

Refrigerator Cars.—One cent per mile run. Such cars will be moved empty without charge either to station or junction point where received by these companies under load or under instructions from car owners, to other stations or for delivery to other connecting lines, except that the aggregate mileage of each owner's cars will be equalized as between empty and loaded movement, either by a mileage equivalent in loaded movement or in accordance with the provisions of the Western Classification, plus the mileage that has been paid on such empty excess whenever the empty excess warrants

28 such action. Mileage will be computed as in the case of all other freight cars, from conductors' reports. No mileage will be paid for switching movement at terminals nor for movement of cars under empty freight car tariffs."

The foregoing rule constituted a part of the published tariff of each railroad over which the defendant shipped its products as herein stated in any of its refrigerator cars in Minnesota during all of the times mentioned in the complaint. In actual practice

said cars were loaded by the defendant at points designated by it, and were then hauled by the respective railroad companies over whose lines the defendant desired to ship its products to points designated by the defendant. When the cars were unloaded by the defendant at their respective points of destination, they were then taken by said railway companies either to their respective points of origin, or to such other points as the defendant might designate. Under normal conditions said cars were either used in transporting the products of the defendant from place to place, or were being returned empty over the same route for other loads of such products. Under the car service rules which are recognized and followed by all railroad companies in Minnesota and elsewhere in the United States, the owner of a refrigerator car or of any other privately owned car, including this defendant, is, and during all of the times mentioned in the complaint, was entitled to a return movement of the car to the point where it was originally loaded; but the railway company handling the said car does, and during the period covered by the complaint, did in actual practice
29 carry a load in said car on such return movement wherever practicable to do so, in order that there should be as little empty movement as possible. All repairs made by any railroad company on the cars of the defendant while in its possession are charged by said repairing company to the defendant, and are paid for by the defendant, except where such repairs are made necessary by negligent handling of the cars by the railroad company.

The car mileage paid by the railroad companies to the defendant for the use of said cars has never at any time had any connection with, or bearing upon, the freight rates charged on the products carried in the cars, and the said railway companies have at all times collected and retained the usual and lawful tariff rates on such products so transported.

Except for the designation of points of destination and the routing of shipments as above described, the defendant does not have, nor has it at any time had any control whatever over the movement and handling of its said cars while they have been in the hands of the carriers, and said cars have at all times been in all respects, so far as such movement and handling are concerned, subject to the exclusive control of the carriers in the same manner as other car equipment owned and used by them.

III.

The cars here involved were employed in transporting the products of the defendant (1) from its said packing plants in Sioux City, Iowa; Kansas City, Missouri and South Omaha, Ne-
30 braska, to its said branch houses located is St. Paul, Minneapolis, and Duluth, Minnesota; (2) from said packing plants through and across Minnesota to other points without said state, and (3) in cases where the so-called "peddler cars" hereinafter mentioned were employed from said branch houses in Minnesota and from the said packing plants to various other points in

Minnesota. The said branch houses are so situated as to permit said cars upon their arrival to be set in upon tracks alongside unloading platforms, so that the contents of the said cars can be immediately transferred from the cars to the refrigerators of said branch houses, and later transferred from said refrigerators to cars, in cases where the so-called "peddler cars" are to be used. In the ordinary course of business cars (not including peddler cars) are promptly unloaded, and immediately hauled away empty by the railway companies for return to their respective points of origin. The defendant does not own, lease or otherwise control, nor has it at any time owned, leased or otherwise controlled, any ice houses or icing stations or stationary oil tanks or any other property within the State of Minnesota which is or has been at any time used in connection with the operation of its said refrigerator cars except as herein stated. The business of the defendant within Minnesota has, at all times mentioned in the complaint, consisted exclusively in the marketing of its said products as herein described through its said branch houses and by means of the said peddler cars and also in shipping its said products in said refrigerator cars, as above stated, through or across Minnesota to points without Minnesota.

31 The icing of said cars while in the State of Minnesota is and has been at all times done exclusively by the respective railroad companies. From time to time during the period mentioned in the complaint certain of said refrigerator cars have been loaded at the Minnesota branch houses of the defendant with the defendant's products, and said products so loaded have been consigned to points within the State of Minnesota; and during such period certain of said cars have also been so loaded at the said packing plants of the defendant outside of Minnesota with products consigned to various points within Minnesota other than said branch houses for the distribution of said products to retail dealers. The cars so loaded at branch houses and at packing plants with products consigned to points in Minnesota other than branch houses of the defendant are designated as "peddler cars," and are the peddler cars referred to throughout this stipulation. All of such peddler cars loaded at Minnesota branch houses of the defendant have been by the defendant caused to be there iced, such icing being provided for by contracts made by the defendant with various ice companies, whereby the latter companies haul the ice and deposit the same in the ice compartments of said cars.

IV.

The revenue derived by the defendant from the cars involved in this proceeding during all of the times mentioned in the complaint has been the car mileage of one cent per mile paid by the railway companies for the use of such cars as above stated, which is the only revenue derived by defendant from such cars. During

32 the years mentioned in the complaint the defendant has received from the various railway companies by which said cars have been handled, as herein described, the amounts set forth in Exhibit A attached to the complaint herein, such

amounts being computed on the basis of compensation of one cent per mile as above stated. All such arrangements between the defendant and the railway companies concerning the use of cars have at all times mentioned in the complaint been made at points outside the State of Minnesota, and, pursuant to such arrangements so made, all car mileage payable by the carriers to and received by the defendant have at all such times been paid and received in the course of settlements made at points outside the State of Minnesota.

The amounts sought to be recovered from the defendant by the State in this action are arrived at by treating as earnings subject to taxation, the car mileage compensation derived by the defendant from the railroad companies, as above stated. The particular amounts here involved represent mileage made by such cars of the defendant as were either kept and continuously used within the State of Minnesota as herein described, or were periodically, regularly and habitually within the State, passing through, into or out of the state, as herein described. All of said revenue so claimed to be earnings subject to taxation was based upon mileage made by said cars in Minnesota while used as herein stated by the railway companies either in transporting shipments between points within the state or in transporting shipments in interstate commerce,—

that is to say, shipments passing through, into or out of the
33 state. Substantially 90 per cent of said mileage, rentals upon which are here involved, was made in interstate transportation, and substantially 10 per cent in intrastate transportation. The cars involved were substantially uniform in style, character and value. The actual cash value of each of said cars varied from $700 to $900 depending largely upon the length of time in which each such car had been in use.

The entire mileage above referred to, both interstate and intrastate, has been made up of substantially the following car movements:

A. From packing houses outside of Minnesota to branch houses within the State of Minnesota, an average of eleven cars per week.

B. From packing houses outside the State of Minnesota to branch houses beyond Minnesota involving transportation through Minnesota, an average of four cars per week.

C. So-called "peddler cars" loaded at Minnesota branches and consigned to points in Minnesota, an average of four cars per week.

D. So-called "peddler cars" loaded at packing houses outside the State of Minnesota and consigned to various points in Minnesota, an average of five cars per week.

The average number of cars per day so in Minnesota has been during all of the times mentioned in the complaint, the following for all four classes of business above indicated:

During the year 1907, 10 cars.
During the year 1908, 11 cars.
During the year 1909, 12 cars.
During the year 1910, 12 cars.
During the year 1911, 12 cars.
During the year 1912, 12 cars.

34 Exhibit "A" attached to the complaint correctly states the amounts reported by the defendant to the State of Minnesota as earnings for the years 1907 to 1912 inclusive, and such earnings there designated "reported" comprise the compensation or the car mileage received by the defendant, based upon strictly intrastate shipments, including the movement of cars so employed, both loaded and empty, with the exception of the years 1907 and 1912, for which years the defendant reported its said compensation from car mileage, derived from the total mileage made by its said cars in Minnesota, both interstate and intrastate, except that it did not include the mileage made in Minnesota by any of its said cars in passing through or across Minnesota where neither the point of origin nor the point of destination was within Minnesota. The amounts shown upon said Exhibit "A" and designated "omitted earnings" comprise the compensation received by the defendant as car mileage from the railway companies, derived from Minnesota's proportion of interstate mileage made by said cars coming into, running out of or going through said state and based upon figures made by the various railway companies and show actual payments made by the said companies to the defendant. In each of the years 1907 to 1912, inclusive, the defendant's report of earnings from said cars was made under protest with the statement that the defendant was not a freight line company within the scope, meaning and operation of the law under which the tax was undertaken to be assessed and collected.

35 V.

During the entire period covered by the complaint herein the various railway companies by which and over whose lines the said cars of the defendant have been operated have charged and received the full and lawful tariff freight rates and charges upon all products carried in said cars, both in interstate and intrastate transportation; and the total gross earnings derived by the said railway companies from the operation of said cars in Minnesota, including not only all earnings of business beginning and ending in Minnesota, but also a proportion based upon the proportion of the mileage within Minnesota to the entire mileage over which such business was done of earnings on all interstate business passing through, into or out of the state, have been duly reported for taxation in each of said years by the said several railway companies by which and over whose lines said cars were operated; except that since and including the year 1907 such railway companies in reporting their gross earnings for taxation have treated the payments to the defendant, as well as other similar car owners, in the same manner as payments made to other railroad companies for use of equipment: that is to say, the railway companies have followed the rule laid down in State vs. Minnesota & International Railway Company, 106 Minnesota, 176, that where accounts are kept between different companies, and reciprocal charges are made based on car mileage for use of equipment, then up to the point where the accounts balance the operation is to be regarded as

36 a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid by it for the use of the cars of other companies, is one of its sources of revenue earned by its rolling stock, and should be included in its gross earnings returned for taxation; and in following said rule said railway companies have since and including 1907 treated car mileage payments to the defendant and similar car owners in the same manner as credits given to other railway companies for use of equipment, notwithstanding the fact that there has never at any time been any exchange of equipment as between the said railway companies and the defendant and said other owners of cars similarly situated. Prior to the year 1907 the said railway companies doing business in Minnesota included in their gross earnings reported for taxation purposes all payments made to owners of refrigerator cars, including this defendant, used and operated as herein described. Pursuant to the terms and conditions of the railroad gross earnings tax laws of the State of Minnesota, to-wit: Chapter 253 of the General Laws of Minnesota for 1903 and Sections 1003 to 1011 inclusive of the Revised Laws of Minnesota for 1905, the said railway companies in each of the years 1907 to 1912 were duly assessed and paid a percentage of the gross earnings reported by them respectively as above stated, which payment was "in lieu of all taxes and assessments upon all property within this state owned or operated for railway purposes" by such companies respectively "including equipment, appurtenances, appendages and franchises."

37 VI.

During the years 1907 to 1912 inclusive, the defendant has been assessed by local assessors in the three cities of St. Paul, Minneapolis and Duluth for its real property and upon its personal property in and about said branch houses in said three cities, and has paid taxes thereon as follows:

Year.	St. Paul. Real.	St. Paul. Personal.	Minneapolis. Personal.	Duluth. Personal.
1907	$114.85	$234.82	$190.99	$193.51
1908	94.99	211.90	648.45	162.44
1909	103.04	.....	277.50	150.80
1910	105.29	.....	294.47	174.88
1911	642.40	233.44	257.99	171.54
1912	644.60	153.09	138.60	191.54

But none of the cars of the defendant involved in this action have been assessed by local assessing or taxing officers within the State of Minnesota, and the only tax attempted to be levied or assessed against said cars or the owners thereof is the gross earnings tax here involved. The defendant has not during any of the said years 1907 to 1912 inclusive been assessed by local assessing or taxing officials within the State of Minnesota for or on account of any of the said cars involved in this proceeding.

VII.

During the years 1907 to 1912 inclusive, the average rate of taxation applicable to personal property throughout the State of Minnesota as a whole has been as follows:

1907—25.91 mills.	1910—27.92 mills.
1908—26.98 mills.	1911—29.67 mills.
1909—27.79 mills.	1912—27.74 mills.

During said period the rate of taxation has varied greatly in
38 different counties and in different taxing districts within the various counties and such rate of taxation has been as high as 61.07 mills in some counties and has been over two hundred (200) mills in some local taxing districts within such counties.

VIII.

The defendant has never paid any taxes to the State of Minnesota during the years 1907 to 1912 inclusive, except as hereinabove stated and except as appears from said Exhibit A attached to the complaint herein.

Said Exhibit A is true in all respects, and the facts as to all of said omitted earnings contained in said Exhibit A were obtained by the Public Examiner of Minnesota from examinations made by him in the conduct and management of his said office, and the Minnesota Tax Commission during all of said years, after having said omitted earnings certified to it by said Public Examiner and said partial reports of earnings reported by defendant, duly levied the tax against the defendant upon its property in Minnesota in the sums set forth in said Exhibit, and immediately upon such tax being so levied and reported, the State Auditor made his draft upon such freight line company for the amount of said taxes upon such earnings so reported or so ascertained, and placed such draft in the hands of the State Treasurer for collection.

Said Exhibit A also correctly states the dates upon which payments of said taxes and penalties were demanded.

39 IX.

Railroad car equipment, including box cars, flat cars, coal cars, ore cars, tank cars, stock cars, gondola cars, furniture cars and refrigerator cars, owned by companies or persons other than railroads engaged in the actual business of operating lines of railway, has, during all of the time since long prior to 1897, been handled, used and paid for by railroad companies not only in the manner hereinabove described, but also under conditions and arrangements which differ from said above described system in the following respects:

1. The rate of car mileage paid by railroad companies to such owners of cars has varied from time to time, and at all times different rates have applied to different types of cars used.

2. The railroad companies have themselves frequently caused to be organized separate corporations, generally termed "equipment companies," to hold the title to cars, engines and other rolling stock and lease the same to the railroad companies respectively by which the equipment companies have been caused to be formed. The purpose of this equipment company device is to prevent the equipment involved from becoming subject to the lien of trust deeds or mortgages made by the railroad companies; but the equipment so leased is, subject to the terms of the lease, handled and used in all respects by the railroad company as if it were its own. These equipment companies are not operating companies in any sense; their activities are confined to owning and leasing the equipment and receiving from the lessee railroad companies the agreed compensation for
40 the use of the equipment leased.

3. Live stock cars for the transportation of horses and poultry are commonly owned by companies which do not own or operate railroads. Such companies have two sources of revenue arising from the ownership of their cars. They receive from the railroad companies over whose lines the cars travel a stated mileage payment, based upon both loaded and empty movement. They also receive from the shippers whose freight is carried in the cars a fixed rental for the use of the cars, based upon the distance the freight is to be transported. The latter charge is usually collected from the shipper by the railroad company for the car owning company as an advance charge on the freight bill at the same time that the railway company collects for its own account its regular tariff charges for transportation. The car owning company issues no bills of lading, and does not contract to transport freight.

4. A further class of companies, of which the Merchants Despatch Transportation Company and the New York Despatch Transportation Company are examples, own refrigerator and other freight cars which run over practicaly all lines of railway throughout the United States under a car mileage arrangement by which the respective railway companies over whose lines the cars travel pay the owning company a fixed amount for each mile so traveled by each car. These rates of compensation for the use of such cars are set forth in the regular tariffs filed and published by all railroad companies. The car owning companies in question do not,
41 like the defendant, have any freight of their own for shipment, but they are affiliated with certain railroads or railroad systems, such as the New York Central Lines and the Grand Trunk Railway System. These car owning companies maintain offices and agencies through the United States, including various points in Minnesota, and through these offices and agencies they solicit shipments of freight going either to or from points located on the line of railroad with which said soliciting companies are respectively affiliated. They use their own billing in routing the shipments, but do not issue bills of lading to shippers, and do not paticipate with the railroad companies in the division of the freight charges for transportation except on the lines of the railroad companies with which they are respectively affiliated. They do receive

from such railroad companies either a substantial percentage of the freight charges collected by those companies on shipments traveling in their cars or a flat rate per ton on shipments so made. Although such affiliated car owning companies have maintained offices and agencies and solicited business in Minnesota since long prior to 1897, no railroad company operating in Minnesota had, during any of said time, any such affiliated car owning company. Railroads operating in Minnesota have at all times handled the cars of car owning companies on a car mileage basis except in certain instances, when a stated amount per diem has been paid for the use of cars.

Such affiliated car owning companies have not existed as
42 separate corporate entities since April, 1912.

LYNDON A. SMITH &
WILLIAM J. STEVENSON,
Attorneys for Plaintiff.
DAVIS, KELLOGG & SEVERANCE,
Attorneys for Defendant.

Certified copy of articles of incorporation of the Armour-Cudahy Packing Company, together with certificate of change of name to The Cudahy Packing Company. Dated August 29, 1887, and Dec. 18, 1890.

Articles of Incorporation.

STATE OF ILLINOIS,
County of Cook, ss:

To Henry D. Dement, Secretary of State:

We, the undersigned, Charles F. Langdon, Jacob R. Custer and Calvin M. Favorite, propose to form a Corporation under an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations," approved April, 1872, and all acts amendatory thereof; and that for the purpose of such organization we hereby state as follows, to-wit:

I. The name of such Corporation is "The Armour-Cudahy Packing Company."

II. The object for which it is formed is to purchase and slaughter cattle, hogs and sheep and manufacture and dispose of the products thereof; to deal in meat provisions, and to store provisions and issue warehouse receipts therefor.

III. The capital stock shall be seven hundred and fifty thousand dollars.

43 IV. The number of shares shall be seventy-five hundred.

V. The amount of each share is one hundred dollars.

VI. The location of the principal office is in or near the City of Chicago in the County of Cook and State of Illinois.

VII. The duration of the Corporation shall be ninety-nine years.

CHARLES F. LANGDON,
JACOB R. CUSTER,
CALVIN M. FAVORITE.

STATE OF ILLINOIS,
County of Cook, ss:

I, Ada M. Lowrie, Notary Public in and for the said County in the State aforesaid, do hereby certify that on this 27th day of August, A. D., 1887, personally appeared before me Charles F. Langdon, Jacob R. Custer and Calvin M. Favorite, to me personally known to be the same persons who executed the foregoing instrument and severally acknowledged that they executed the same for the purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and Notarial Seal, this 27th day of August, A. D., 1887.

[SEAL.] ADA M. LOWRIE,
Notary Public, Cook County, Illinois.

Filed August 29, 1887. Henry D. Dement, Secretary of State.

STATE OF ILLINOIS,
Department of State:

44 Henry D. Dement, Secretary of State, to All to whom These Presents Shall Come, Greeting:

Whereas, It being proposed by the persons hereinafter named to form a corporation, under an Act of the General Assembly of the State of Illinois, entitled, "An Act Concerning Corporation," approved April 18th, 1872, in force July 1st, 1872, and the amendments thereto, the objects and purposes of which corporation are set forth in a statement duly signed and acknowledged according to law, and this day filed in the office of the Secretary of State:

Now, Therefore, I, Henry D. Dement, Secretary of State of the State of Illinois, by virtue of the power vested in and the duties imposed upon me by law, do hereby authorize, empower, and license Charles F. Langdon, Jacob R. Custer and Calvin M. Favorite, the persons whose names are signed to the before mentioned statement, as Commissioners to open books for subscription to the capital stock of The Armour-Cudahy Packing Company, such being the name of the proposed Corporation as contained in the statement, at such times and places as the said Commissioners may determine.

In Testimony Whereof, I have hereto set my hand and caused to be affixed the Great Seal of State.

Done at the City of Springfield, this 29th day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the independence of the United States the one hundred and twelfth.

[SEAL.] HENRY D. DEMENT,
Secretary of State.

45 To Henry D. Dement, Secretary of State of the State of Illinois:

The Commissioners duly authorized to open books of subscription to the capital stock of The Armour-Cudahy Packing Company pur-

suant to license heretofore issued bearing date the 29th day of August, A. D., 1887, do hereby report that they opened books of subscription to the capital stock of said Company, and that the said stock was fully subscribed; that the following is a true copy of such subscription, viz: "We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the capital stock of The Armour-Cudahy Packing Company and we severally agree to pay the said Company, for each share, the sum of $100.00.

Name.	Shares.	Amount.
Philip D. Armour	2350	$235,000
Michael Cudahy	2350	235,000
Edward C. Cudahy	2800	280,000
	7500	$750,000

That on the thirteenth day of September, A. D., 1887, at the office of the Company in Chicago, at the hour of 3 o'clock P. M., they convened a meeting of the subscribers aforesaid, pursuant to notice required by law, which said notice was deposited in the postoffice, properly addressed to each subscriber, ten days before the time fixed therein, a copy of which said notice is as follows, to-wit:

To —— ——:

You are hereby notified that the capital stock of The Armour-Cudahy Packing Company has been fully subscribed, and that a meeting of the subscribers of such stock will be held at office 46 . of Armour & Co., 205 La Salle St., Chicago, on the thirteenth day of September, A. D., 1887, at 3 o'clock P. M., for the purpose of electing a Board of Directors for said Company, and for the transaction of such other business as may be deemed necessary.

(Signed) CHARLES F. LANGDON,
JACOB R. CUSTER,
CALVIN M. FAVORITE,
Commissioners.

That said subscribers met at the time and place in said notice specified, and proceeded to elect directors, and that the following persons were duly elected for the term of one year, viz:

Philip D. Armour, one year.
Michael Cudahy, " "
Edward C. Cudahy, " "

CHARLES F. LANGDON,
JACOB R. CUSTER,
CALVIN M. FAVORITE,
Commissioners.

STATE OF ILLINOIS,
County of Cook, ss:

On this thirteenth day of September, A. D., 1887, personally appeared before me, a Notary Public in and for said County, in said

State, Charles F. Langdon, Jacob R. Custer and Calvin M. Favorite, and made oath that the foregoing report by them subscribed is true in substance and in fact.

[SEAL.] ADA M. LOWRIE,
Notary Public.

Filed September 14, 1887. Henry D. Dement, Secretary of State.

47 STATE OF ILLINOIS,
Department of State:

Henry D. Dement, Secretary of State, to All to Whom These Presents Shall Come, Greeting:

Whereas, a Statement, duly signed and acknowledged, has been filed in the office of the Secretary of State, on the 29th day of August, A. D., 1887, for the organization of The Armour-Cudahy Packing Company, under and in accordance with the provisions of "An Act concerning Corporations," approved April 18, 1872, and in full force July 1, 1872, and all Acts amendatory thereof, a copy of which statement is hereunto attached:

And Whereas, a License having been issued to Charles F. Langdon, Jacob R. Custer and Calvin M. Favorite, as Commissioners to open books for subscription to the capital stock of said company:

And Whereas, the said Commissioners, have, on the 14th day of September, A. D., 1887, filed in the office of the Secretary of State, a report of their proceedings under the said license, a copy of which report is hereunto attached:

Now, Therefore, I, Henry D. Dement, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby certify that the said The Armour-Cudahy Packing Company is a legally organized Corporation under the laws of this State.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 14th day of September, in the year of our Lord one thousand eight hundred and eighty-
48 seven and of the independence of the United States the one hundred and twelfth.

[SEAL.] HENRY D. DEMENT,
Secretary of State.

Certificate of Change of Name to the Cudahy Packing Company.

STATE OF ILLINOIS,
County of Cook, ss:

We do hereby certify that at a special meeting of the stockholders of The Armour-Cudahy Packing Company held at its office in the City of Chicago, on the 15th day of December, 1890, at two o'clock P. M., pursuant to notice given in the manner provided by law, the following resolution was submitted to the stockholders:

Resolved, That the name of this Corporation be and the same is hereby changed from "The Armour-Cudahy Packing Company," to "The Cudahy Packing Company," which said resolution was adopted by the stockholders, all of the stockholders voting all of the stock of said Corporation in the affirmative and no one voting in the negative.

In Witness Whereof, We have hereunto set our hands and caused the seal of said Corporation to be affixed this 15th day of December, 1890.

[CORPORATE SEAL.] THE ARMOUR CUDAHY PKG. CO.,
By MICHAEL CUDAHY,
President.

Attest
CHARLES F. LANGDON, *Secretary.*

STATE OF ILLINOIS,
County of Cook, ss:

Michael Cudahy being first duly sworn doth depose and
49 say that he is President of the "Armour-Cudahy Packing Company;" that he has read the foregoing certificate by him subscribed and knows the contents thereof, and that the matters and things therein contained are true in substance and in fact.

MICHAEL CUDAHY.

Subscribed and sworn to before me this 16th day of December, 1890.

[SEAL.] J. R. CUSTER,
Notary Public.

Filed December 18, 1890. I. N. Pearson, Secretary of State.

Increase of Capital Stock to $3,500,000. *Office of the Cudahy Packing Company.*

No. 763 The Rookery, in the City of Chicago.

STATE OF ILLINOIS,
County of Cook, ss:

We hereby certify that at a special meeting of the stockholders of the Cudahy Packing Company, held at the office of said Company, in Chicago, on the 15th day of November, 1892, pursuant to notice given in the manner provided by law, it was resolved:

"That the capital stock of the Cudahy Packing Company be and the same is hereby increased from seven hundred and fifty thousand dollars, its present capital stock, to three million five hundred thousand dollars."

Which resolution was adopted by the stockholders, the votes represented by the entire capital stock of said company voted therefor.

In witness whereof, we have hereunto set out hands and
50 affixed the seal of the corporation on the 15th day of November, A. D., 1892.

[SEAL.] MICHAEL CUDAHY, *Pres.*
A. F. BORCHERDT, *Sec'y.*

STATE OF ILLINOIS,
County of Cook, ss:

Michael Cudahy being duly sworn says that he is the President of the Cudahy Packing Company, that he has read the foregoing certificate and knows the contents thereof, and that the same is true in substance and in fact.

MICHAEL CUDAHY.

Sworn to and subscribed before me this 16th day of November, A. D. 1892.

[SEAL.] DANIEL J. CARROLL,
Notary Public.

Filed November 17, 1892. I. N. Pearson, Secretary of State.

Increase of Capital Stock to $7,000,000

This is to certify that at a special meeting of the stockholders of the Cudahy Packing Company, held on the 15th day of November, A. D. 1900, at the office of said Company in the Rookery Building in Chicago, at two o'clock of said day, pursuant to a notice given on the 15th day of October, A. D. 1900, which special meeting was called for the purpose of increasing the capital stock of said corporation from three million five hundred thousand dollars ($3,500,000) to seven million dollars ($7,000,000) at which said meeting all of the stockholders of said corporation were present in person or by proxy, the following resolution was unanimously passed:

51 "Resolved, that the capital stock of the Cudahy Packing Company be, and the same hereby is increased from three million five hundred thousand dollars ($3,500,000), its present capital stock, to seven million dollars ($7,000,000)."

In witness whereof, the said corporation has caused these presents to be signed by its president, attested by its secretary and caused its corporate seal to be hereto affixed this 15th day of November, A. D. 1900.

[SEAL.] THE CUDAHY PACKING CO.,
By MICHAEL CUDAHY,
President.

Attest:
A. F. BORCHERDT, *Secretary.*

(10c Revenue Stamps.)

STATE OF ILLINOIS,
County of Cook, ss:

Michael Cudahy, being first duly sworn on his oath, deposes and says that he is now and was on the fifteenth (15th) day of November, A. D. 1900, the President of the Cudahy Packing Company; that he has read the foregoing certificate and knows the contents thereof and that the same is true, and that said meeting was held as therein stated, and that by unanimous vote of all of the stockholders of said corporation, the capital stock of said corporation was increased from three million five hundred thousand dollars ($3,500,000) to seven million dollars ($7,000,000).

MICHAEL CUDAHY.

Subscribed and sworn to before me this 15th day of November, A. D. 1900.

[SEAL.] CARL MEYER,
Notary Public.

Filed November 16, 1900. James A. Rose, Sec'y of State.

52 *Certificate of Increase of the Capital Stock of the Cudahy Packing Company and of Change of Corporate Object.*

This is to certify that at a special meeting of the stockholders of the Cudahy Packing Company, convened and held at the hour of two o'clock P. M., on November 7, A. D. 1906, at the office of said Company in Chicago, Illinois, upon notice mailed and published in accordance with the Statute in such case made and provided, the questions of increasing the capital stock of said corporation and changing its object were submitted to vote and thereupon a resolution to increase the capital stock of said corporation and to change its object was unanimously adopted; that said resolution was and is in the following words and figures, to-wit:

"Be it and it is hereby resolved as follows:

1st. That the capital stock of the Cudahy Packing Company be and it is hereby increased from seven millions of dollars ($7,000,000) to twelve millions of dollars ($12,000,000), that is to say, from seventy thousand (70,000) shares of one hundred dollars ($100) each to one hundred and twenty thousand (120,000) shares of one hundred dollars ($100) each;"

2nd. That the object for which the Cudahy Packing Company was formed be so changed as to be and be stated to be as follows:

"The object for which said corporation is formed is to purchase for slaughter and slaughter cattle, hogs and sheep and manufacture and dispose of the products thereof; also to buy, sell and deal in meats, provisions and all classes of produce and packing house products."

53 It is Hereby Further Certified that votes representing fifty-nine thousand nine hundred (59,900) out of the whole seventy-thousand (70,000) shares of the stock of said corporation

being more than two thirds of all its shares of capital stock, were cast in favor of said resolution, and the increase of stock and change of corporate object herein provided for.

In Witnesse Whereof said the Cudahy Packing Company has hereunto caused its corporate name to be set by its President and its seal to be hereunto affixed and attested by its Secretary.

THE CUDAH PKG. COMPANY,
(Sgd.) By MICHAEL CUDAHY,
[SEAL.] *Its President.*
Attest:
A. F. BORCHERDT, *Secretary.*

STATE OF ILLINOIS,
County of Cook, ss:

I, Michael Cudahy, of Chicago, Illinois, being first duly sworn, do depose and say that I am the President of the Cudahy Packing Company, a corporation under the laws of Illinois; that I have read and, as such President, subscribed to the above and foregoing certificate of increase of the capital stock of said Company and change of its object, and that such certificate and all the statements therein contained are true.

MICHAEL CUDAHY.

Signed and sworn to before me this 13th day of November, A. D. 1906.

[SEAL.] J. R. MURRAY,
Notary Public.

54 STATE OF ILLINOIS,
County of Cook, ss:

No. 3,970,097.

Filed for Record Dec. 24, A. D. 1906, 10 o'clock a. m., and recorded in book 137 of Corporation Records page 528.
[SEAL.] (Sgd.) ABEL DAVIS, *Recorder.*

Filed Dec. 27, 1906. James A. Rose, Secretary of State.

UNITED STATES OF AMERICA,
State of Illinois, ss:

Office of the Secretary of State.

I, James A. Rose, Secretary of State of the State of Illinois, do hereby certify that the foregoing consisting of 10 pages, in pamphlet form, is a true copy of the articles of Incorporation of the Armour-Cudahy Packing Co., of the certificate of change of name of the said company so as to be the Cudahy Packing Co., the certificate showing the increase of the capital stock of said company from

$750,000 to $3,500,000, the certificate showing the increase of the capital stock of said company from $3,500,000 to $7,000,000, and the certificate showing the increase of the capital stock from $7,000,000 to $12,000,000, the originals of all of which are now on file in my office. The statements and headings above enclosed in red ink brackets are not taken from the public records and are not intended to be included in the certificate.

In Witness Whereof, I have hereunto set my hand and
55 affixed the Great Seal of State, at the City of Springfield, this 16th lay of April, 1907.

[SEAL] JAMES A. ROSE,
Secretary of State.

Stipulation of Facts endorsed: Presented to the Court and filed herein April 14, 1914. Olin B. Lewis, District Judge.

Findings of Fact and Conclusions of Law endorsed: Filed Sept. 19, 1914. Matt Jensen, by G. P. Ritt, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled action that the foregoing and proposed case contains all the evidence introduced and offered at the trial of the above entitled action by the respective parties thereto, and the decision of the court; and that the same may be allowed as and for the settled case in said action.

Dated October 26th, 1914.

LYNDON A. SMITH,
WILLIAM J. STEVENSON,
Attorneys for Plaintiff.
DAVIS, KELLOGG & SEVERANCE,
Attorneys for Defendant.

Endorsed: Filed Oct. 27, 1914, Matt Jensen, by G. P. Ritt, Deputy.

55¼ STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Costs and Disbursements.

Statutory Costs	$10.00
Sheriff's Fees	1.20
Clerk's Fees, to be taxed	4.00
Total	$15.00

The above bill of costs and disbursements taxed and allowed at $15.00 this 21st day of October, 1914.

(Signed) MATT JENSEN,
Clerk of District Court.

(Signed) By G. A. JOHNSON,
Deputy Clerk.

Affidavit of Disbursements.

STATE OF MINNESOTA,
County of Ramsey:

William J. Stevenson being duly sworn, says on oath, that he is the Assistant Attorney General of the State of Minnesota, and one of the Attorneys for the plaintiff in the above entitled action; and that the foregoing is a true and correct statement of the costs and disbursements of said Plaintiff in the above entitled action; and that the foregoing items of disbursements, and each item thereof, have been actually and necessarily paid or incurred therein, by and on behalf of said Plaintiff.

(Signed) WILLIAM J. STEVENSON.

55½ Subscribed and sworn to before me this 19th day of October, 1914.

[NOTARIAL SEAL.] D. G. STRUTZEL,
Notary Public, Ramsey County, Minnesota.

My Commission expires June 1, 1916.

Stipulation.

The defendant in the above entitled action hereby stipulates that the stay of proceedings heretofore entered herein may be considered

as hereby vacated and judgment entered forthwith, and that the foregoing bill of costs and disbursements may be included in said judgment without further notice.

(Signed) DAVIS, KELLOGG & SEVERANCE,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 21, 1914. Matt Jensen, Clerk, by G. A. Johnson, Deputy.

56 *Order.*

I hereby certify that the foregoing and attached proposed case contains all the evidence introduced and offered by the respective parties to the above entitled action, all objections, rulings and exceptions in connection with the introduction of said testimony, and all proceedings had on the trial of said action; and I hereby settle and allow the same as and for the settled case herein.

Dated this 27th day of Otcober, 1914.

OLIN B. LEWIS,
District Judge.

Endorsed: Filed Oct. 27, 1914, Matt Jensen, by G. P. Ritt, Deputy.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Judgment.

The above entitled action having been tried by the Court, without a jury, Lewis J. presiding, and said Court having filed its Findings of Fact and Conclusions of Law and Order for Judgment in favor of Plaintiff and against Defendant.

Now, on motion of Lyndon A. Smith and William J. Stevenson the plaintiff's attorneys, it is hereby adjudged that the plaintiff herein recover of said defendant The Cudahy Packing Company, (a Corporation) the sum of Three Thousand Sixty-six and .46 Dollars, damages, with Fifteen Dollars costs and disbursements,
57 in all amounting to $3,081.46.

Signed this 21st day of October A. D. 1914.

MATT JENSEN, *Clerk.*
By G. A. JOHNSON,
Deputy Clerk.

Endorsed: Filed 21st day of October, A. D. 1914, Matt Jensen, Clerk, by G. A. Johnson, Deputy Clerk.

STATE OF MINNESOTA,
County of Ramsey:

District Court, 2nd Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
THE CUDAHY PACKING COMPANY, a Corporation, Defendant.

Notice of Appeal.

To Lyndon A. Smith and William J. Stevenson, Attorneys for Plaintiff, and Matt Jensen, Clerk of said District Court:

You will please take notice that the above named defendant The Cudahy Packing Company appeals to the Supreme Court of the State of Minnesota from the judgment of this court in this action entered on the 21st day of October, 1914.

Dated October 24, 1914.

DAVIS, KELLOGG & SEVERANCE,
Attorneys for Defendant, St. Paul, Minnesota.

Due service of the foregoing Notice of Appeal at St. Paul, Minn., this 26th day of October, 1914, is hereby admitted, and bond
58 on appeal is hereby waived.

LYNDON A. SMITH,
WILLIAM J. STEVENSON,
Attorneys for Plaintiff.
MATT JENSEN,
Clerk of District Court.

Endorsed: Filed Oct. 27, 1914, Matt Jensen, Clerk, by G. P. Ritt, Deputy.

STATE OF MINNESOTA,
County of Ramsey, ss:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State that I have compared the foregoing paper writing with the original Notice of Appeal and Waiver of Bond in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and the seal of said Court, at St. Paul, this 27th day of October, A. D. 1914.

[SEAL.] MATT JENSEN, *Clerk,*
By G. P. RITT, *Deputy Clerk.*

59 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

19134.

STATE OF MINNESOTA, Respondent,
vs.
CUDAHY PACKING COMPANY, Appellant.

Assignments of Error.

Frank B. Kellogg, C. A. Severance, Robert E. Olds, W. S. Carter, Attorneys for Appellant, Merchants National Bank Bldg., St. Paul, Minnesota.
Thomas Creigh, Counsel.

(Endorsed:) Filed Feb. 3, 1913. I. A. Caswell, Clerk.

60 STATE OF MINNESOTA:

In Supreme Court, October Term, 1914.

STATE OF MINNESOTA, Respondent,
vs.
CUDAHY PACKING COMPANY, Appellant.

Assignments of Error.

1. The court erred in making the fourth finding of fact reading as follows:
"4. That defendant during all the times mentioned in the complaint was a freight line company as defined by the statutes and laws of the state of Minnesota.
2. The court erred in holding in and by its conclusion of law "that the defendant at all the times referred to in the complaint was a freight line company as defined by the statutes and laws of the State of Minnesota."
3. The court erred in holding in and by its second conclusion of law "that there is now due and owing the State of Minnesota from defendant Cudahy Packing Company for taxes duly levied by plaintiff against defendant upon its property in the State of Minnesota the sum of $2,111.10 and $625.81 accrued penalties to the date of the commencement of this action, besides such further penalties and interest as may accrue prior to the entry of judgment herein, together with its costs and disbursements of this action."
4. The court erred in holding that the appellant was during the times mentioned in the complaint engaged in operating the cars or any of the same the rentals from which are involved in this action.
5. The court erred in holding that the gross earnings taxes
61 paid by the various railroad companies operating said cars, based upon the statutory percentage of the freight earnings

derived from the operation of said cars for railroad purposes during all of the times mentioned in the complaint, were not paid by said railroad companies and received by the State in lieu of all taxes upon said cars.

6. The court erred in holding that the said cars could be taxed as the property of the appellant in addition to being taxed as railroad equipment used and operated for railroad purposes by the various railroad companies to which they were leased.

7. The court erred in holding that any part of the revenue received by the appellant and arising from the operation of said cars in carrying on interstate commerce could be levied upon or taxed by the State; the court should have held that with respect to revenue so derived, the tax sought to be collected by the State would constitute a burden upon interstate commerce in contravention of the provisions of the Constitution of the United States.

8. The court erred in holding that the amounts sought to be collected from the appellant as gross earnings taxes for each of the years in question, constituted a fair equivalent of a tax upon the cars themselves in each of said years; the court should have
62 held that on the face of the facts as found, said taxes in each of said years were more than a fair equivalent of a tax on said cars, and therefore constituted a deprivation of property without due process of law, as well as a denial of the equal protection of the laws, in contravention of the provisions of the Constitution of the United States.

We respectfully submit that the judgment should be reversed.

DAVIS, KELLOGG & SEVERANCE,
Attorneys for Defendant.

63 STATE OF MINNESOTA:

Supreme Court.

No. 19134.

STATE OF MINNESOTA, Respondent,
vs.
CUDAHY PACKING COMPANY, Appellant.

Opinion and Syllabus.

Filed March 5th, 1915. I. A. Caswell, Clerk.

Holt, J.

64 19134.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 297.

STATE OF MINNESOTA, Respondent,
v.
CUDAHY PACKING COMPANY, Appellant.

Syllabus.

Chapter 250 Laws of 1907 authorized the imposition of the gross earnings tax upon the refrigerator cars of defendant operated by it over the lines of different railroads; such operation of cars consisting in directing and controlling the loads, movements, routes, and destination of the cars, the railroads furnishing the motive power and receiving the same freight rates as if the shipments were carried in like cars of the railroads, but paying defendant one cent for each mile a car is hauled.

Judgment affirmed.

85 19134.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 297.

STATE OF MINNESOTA, Respondent,
v.
CUDAHY PACKING COMPANY, Appellant.

Opinion.

The state seeks to enforce the collection of taxes due from the defendant as a freight line company under chapter 250 Laws of 1907, and amendatory acts. The taxes involved are for the years 1907 up to and including 1912. The state prevailed and defendant appeals.

The facts are stipulated. If defendant during the years mentioned was a freight line company and subject as such to the gross earnings tax, the judgment is right. It is not deemed necessary to make an extended statement of the contents of the stipulation. Suffice to say, that defendant was, and is, a foreign corporation duly licensed to do business in this state. It owns and operates large slaughtering and packing plants at Sioux City, Iowa, Kansas City, Missouri, and Omaha, Nebraska, and maintains a large number of selling agencies and branch houses at various points in this and other states. To carry on its business defendant found it convenient to own the refrigerator cars in which its products are transported from and to the main plants, and from these to its different selling agencies
86 and branch houses. These cars are moved from place to place by the different railway companies according to defendant's orders or directions. Under certain restrictions the railway companies may carry the goods of other shippers in the cars on their return journey to the packing plants or distributing points. The cars are used in both intrastate and interstate shipments. Defendant pays the same freight rates as if the products were shipped in like refrigerator cars owned by the railroads; but the railroads pay defendant a rental for the use of its cars which, in the territory embracing this state, is one cent for each mile a car is moved. The railroad companies in returning their gross earnings, for the purposes of taxation, deduct the rentals thus paid defendant.

Chapter 250 Laws of 1907 is "an act to provide for the taxation of freight line companies." Such companies are defined thus by section 1: "That any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars, not otherwise listed for taxation in Minnesota for the transportation of freight (whether such freight be owned by such company or any other person or company), over any railway line or lines, in whole or in part, within this state, such line or lines not

being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gandola, furniture or refrigerator car, or by some other name, shall be deemed a freight line company." The other sections of the chapter relate to the imposition and enforcement of a tax upon the gross earnings of such line in lieu of the tax upon its property. We think defendant
67 comes clearly within this law. The intention to bring the large shippers who furnish the cars for the transportation of their products is indicated not only by the clause in parenthesis, but by the careful description of the kind of cars usually owned and operated by these shippers. And were it not for the fact that when the first attempt was made to impose a tax of this nature, prior to the constitutional amendment, the law also included, so called, equipment companies subsequently eliminated and not again mentioned when, thereafter, in 1907 chapter 250 was enacted defining freight line companies in the precise words of the statute defining freight line companies at the time the equipment companies were dropped out, it could hardly be even claimed that defendant was not subject to the taxation of its cars on the gross earnings basis. But now the argument is, the history of the legislation suggests a design not to impose the gross earnings tax upon all companies furnishing cars for railroad transportation, and that this defendant came more appropriately within the definition of an equipment company, as originally contained in the statute, than a freight line company. This argument is also sought to be fortified by the fact that in chap. 377 Laws of 1911 a more inclusive definition was attempted by inserting the words "or engaged in the business of furnishing or leasing cars," after the words "engaged in the business of operating cars." We do not think much force should be given either argument. An equipment company as refined in the law when originally enacter of course referred to something then known to those versed in railway transportation. We think such companies are
68 the ones described in the stipulation of facts thus: "Railroad companies themselves sometimes cause separate corporations to be organized, known as 'Equipment Companies,' to hold title to cars, engines and other rolling stock, and lease the same to the railroad companies respectively by which the equipment companies have been caused to be formed. The purpose of this equipment company device was to prevent such equipment from becoming a subject to the lien of trust deeds or mortgages made by the railroad companies, but the equipment so leased was handled and used in all respects by the railroad company as if it were its own." The defendant is not an equipment company, as described in the stipulation, not as defined in the original statute. It was never engaged in the business of furnishing or leasing cars to be used in the operation of railroads, but it furnished cars for the conduct of its own transportation business. And as to the change in the law of 1911, we know that legislators frequently make verbal changes in the law so as to forestall anticipated technical quibbles. Stress is also laid on the words, "engaged in the business of operating cars." It is evident that operating here does not refer to the physical power exerted in mov-

ing cars upon the railroad tracks, but to the fact that the freight line company directs and controls the movements of the cars employed in the conduct of its transportation business as to kind and quantity of freight to be carried, the route, and the destination. In State v. Cana-a Cattle Car Co., 85 Minn. 457, it was assumed by both court and counsel that the defendant therein was a freight line company, and that decision can aid neither party in this controversy.

Concededly the gross earnings tax is based upon the right
69 to tax the property out of which the earnings are derived. It is a practical method adopted to reach the property for taxing purposes. Corporations engaged in the transportation business have plants or systems combining tangible and intangible property. The business of common carriers considered as a whole, and embracing rights, franchises, equipment, and property of every nature may be taxed as such. Adams Express Co. v. Ohio, 165 U. S. 194. And no doubt this state may now classify for taxation purposes property devoted to transportation by shippers having so extensive shipments of their products that it is deemed necessary to have a transportation business of their own. We cannot say that it is the same property on which the railroad companies paid the full taxes. We think the state may tax upon the gross earnings basis both the railroad companies upon its property as a whole and the freight line companies upon the cars devoted to its transportation business. This is countenanced by the decision in State v. Minnesota International Ry. Co., 105 Minn. 176. There can be no claim of attempted double taxation in this instance, for the state obtains no more than the total gross earnings of the railroads, they having been permitted to deduct the amount the state now recovers of defendant. Of course this would be no reason to enforce the gross earnings tax against defendant unless the statute permits its property set apart for transportation purposes to be assessed under that method. We think the statute, as it existed from 1907 to 1911, so required.

The contention that the tax demanded is not a fair equivalent of a tax upon the cars or property itself, does not appear to have sufficient
merit to require discussion; and the proposition that the
70 tax is an unlawful burden on interstate commerce is answered by State v. United States Express Co. 114 Minn., 346, affirmed in 223 U. S. 335.

The judgment must be affirmed.

HOLT, *J.*

71 #19134.

STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

STATE OF MINNESOTA, Respondent,
vs.
CUDAHY PACKING COMPANY, Appellant.

Petition for Rehearing.

Frank B. Kellogg, C. A. Severance, Robert E. Olds, W. S. Carter, Attorneys for Appellant.
Thomas Creigh, of Counsel.
Filed Mar. 15, 1915. I. A. Caswell, Clerk.

72 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

STATE OF MINNESOTA, Respondent,
vs.
CUDAHY PACKING COMPANY, Appellant.

Petition for Rehearing.

Only on rare occasions have we considered that we rested under any obligation to file a petition for a re-hearing. No ordinary difference of opinion between court and counsel should be held to justify the application. Where, however, after mature deliberation, counsel feel that because of inadequate or obscure methods of presentation they have not succeeded in conveying to the court a full appreciation of all the points involved, there is, we believe, a duty, not only to clients, but to the court, to file such a petition. We believe this case comes within the true spirit and intent of Rule 31 of this court.

It is not our understanding that in an ex parte application of this nature, we ought to argue at length the merits of the case, or that the court should attempt to decide anything more than the preliminary question whether further argument will tend to throw light upon the matter in hand and assist the court in arriving at a confidently just conclusion. We shall, therefore, confine our statement to a brief outline of the reasons which seem to us controlling in favor of a re-argument.

First. The State sued for so-called gross earnings taxes for the years 1907 to 1912 inclusive. There were two principal questions involved. The first concerned only the taxes for the years 1907 to 1910 inclusive. It was wholly a question of statutory construction—whether the appellant came within the definition of a freight line company expressed in the 1907 law. The taxes for 1911
73 and 1912 were assessed under a different law, the interpretation of which was not in controversy. The second point

went to the validity of the State's demand with respect to all of the taxes sued for. It presented the altogether novel question whether railroad equipment held and operated under lease could be taxed on the gross earnings plan to its owner, after it had already been taxed on the same basis by an appropriation, under the railroad law, of the usual percentage of the gross earnings derived by the lessee carrier from the actual operation of the equipment. This question is one of general, permanent and far-reaching importance. A vast amount of railroad equipment is in the same situation as that of this appellant. Reflection will enforce the conviction that the principle involved, if adhered to and logically applied, affects many of the more fundamental problems of general taxation. We cannot avoid the conclusion that we failed to give the court a fair idea of the distinction between, and the relative importance of, the two points involved; and we must, of course, accept full responsibility for the impressions conveyed by our brief and oral argument. The opinion of the court is almost entirely devoted to the comparatively unimportant question of statutory construction. Only one paragraph is devoted to the other point. This reversal of emphasis is undoubtedly due to the fact that the statutory construction point called for a rather extended history of prior legislation in order to present it at all, and that, therefore, it received both in the briefs and arguments, more time and attention than it deserved. The opinion clearly indicates that in the mind of the court the main proposition was almost totally eclipsed by the point raised in connection with the 1907 law.

Second. Throughout, the single paragraph of the opinion which touches the vital feature of the case, there runs an assumption, in the nature of a conclusion both of law and of fact, which lies at the very heart of the entire controversy. We conscientiously believe that with a fair opportunity to do so, we can convince the court that this assumption is unfounded in fact and erroneous in law.

74 The assumption is that the appellant is engaged in the transportation business. We quote the opinion with the passages involving this assumption italicized:

"Concededly the gross earnings tax is based upon the right to tax the property out of which the earnings are derived. It is a practical method adopted to reach the property for taxing purposes. *Corporations engaged in the transportation business* have plants or systems combining tangible and intangible property. The *business of common carriers considered as a whol*, and embracing rights, franchises, equipment, and property of every nature may be taxed as such. Adams Express Co. v. Ohio. 165 U. S. 194. And no doubt this state may now classify for taxation purposes property devoted to transportation by shippers having so extensive shipments of their products that it is deemed necessary *to have a transportation business of their own.* We cannot say that it is the same property on which the railroad companies paid the full taxes. We think the state may tax upon the gross earnings basis both the railroad companies upon its property as a whole and the freight line companies *upon the cars devoted to its transportation business.* This is countenanced by the

decision in State v. Minnesota International Ry. Co. 106 Minn. 176. There can be no claim of attempted double taxation in this instance, for the state obtains no more than the total gross earnings of the railroads, they having been permitted to deduct the amount the state now recovers of defendant. Of course this would be no reason to enforce the gross earnings tax against defendant unless the statute permits *its property set apart for transportation purposes* to be assessed under that method. We think the statute, as it existed from 1907 to 1911, so required."

The stipulation of facts was intended absolutely to negative the proposition that the appellant is engaged in the transportation business. This corporation is a packing company. Its articles of association attached to the stipulation recite that it is organized "to purchase for slaughter and slaughter cattle, hogs and sheep and manufacture and dispose of the products thereof, also to buy, sell and deal in meats, provisions and all classes of produce and packing house products." The nature and actual conduct of its business are fully set out in the stipulation. The circumstances under which it came to be an owner of railroad equipment are described at length. The controlling distinction between the ownership and the operation of such equipment is consistently kept in sight throughout the stipulation. After reciting that the rental received by the appellant has no bearing upon the freight rates charged by the railways on goods carried in the cars, and that the railways collect and retain the usual and lawful tariff rates on such goods, the
75 stipulation, at the end of the second subdivision thereof, states:

"Except for the designation of points of destination and routing of shipments as above described the defendant does not have, nor has it at any time had any control whatever over the movement and handling of its said cars while they have been in the hands of the carriers, and said cars have at all times been in all respects, so far as such movement and handling are concerned, subject to the exclusive control of the carriers in the same manner as other car equipment owned and used by them."

Other passages in the stipulation might be referred to in this connection.

Fundamental as it is, we did not deem it necessary, either in the brief or upon the oral argument, to dwell upon the proposition that the appellant is not engaged in transportation. We assumed that the stipulation had placed that point beyond controversy. It did not seem to us possible, in the light of the stipulation, to classify the packing company as a transportation agency, without laying down a principle which would make practically every shipper in the land a carrier engaged in the transportation business. Every shipper designates the destination of his goods, and every large shipper designates the route which his goods shall travel. Query: Does the mere ownership—without operation—of a part of the equipment by which the goods are carried, convert a shipper into a transporter of goods in intrastate or interstate commerce? The question suggested is one of tremendous import. If it is resolved as the court

has asserted it should be, the consequences are sweeping and revolutionary. We do not assert that a re-argument of this case would of necessity change the court's opinion; but we do contend most earnestly that the finality of such a ruling should wait upon conscious and painstaking argument and careful deliberation. As it stands, the brief paragraph which we have quoted from the opinion decides the crucial point in the case almost without discussion, and places the decision squarely on the ground that the appellant is a carrier engaged in the transportation business. This view of the status of the owner of private cars is directly contrary to the universal understanding throughout the business world, as well
76 as contrary to the views hitherto expressed by any court. We cannot believe that if counsel had presented and argued this phase of the situation adequately, the court would have made this assumption.

Private cars, so-called, have invariably been regarded as railroad equipment under the sole control and operation of the carriers to which they are leased. It has even been held by the Interstate Commerce Commission that a privately owned car standing on a privately owned track is still subject to demurrage charged imposed by the railroad company.

> Procter & Gamble Co. v. Cin., Hamilton & Dayton R'y Co., et al., 19 I. C. C. Reports, 556.
>
> See also Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452.

Third. The court is apparently under the impression that if our main contention were sustained, a substantial amount of property would escape taxation. We do not so understand the situation. It is true the railroads have arbitrarily deducted from their returns the sums which they have paid to the appellant and other car owners as rentals; and the State has thus far acquiesced in these deductions. If our contention with respect to the railroad gross earnings tax and the effect to be given it under the statute is sound, it inevitably follows that the deductions should not be allowed. The railroads should be required to report without any abatement the gross earnings derived by them from the operation of these cars. We have not been able to find any warrant of law for the arbitrary deductions. The issue is really between the railroads and the owners of the cars. The State does not stand to lose anything, however the decision goes. The opinion does not indicate that the court undertook to consider or pass upon the validity of the deductions made by the railroads. There is no reference whatever to the railroad statute. Can the court properly ignore this question. Is it not directly involved? Suppose the State should now proceed against the railway companies for gross earnings taxes com-
77 puted on the amounts of these deductions. In that event, could not the railroads fairly contend that the court had necessarily passed upon the validity of the deductions when it sustained the tax on these same amounts in the hands of the lessors. If the court should dismiss that contention, examine the question

on the merits and arrive at the conclusion—as we say it should—that the railroad tax law contains no warrant for any deduction, would not the holding be a palpable recognition of the principle of double taxation in its most vicious aspect.

In our brief we treated this subject in extenso. We traced the history of the gross earnings system of taxation in this state. We quoted the original statute of 1873 and followed it through its various phases to its present form. We pointed out the leading cases construing the law. We showed that the court had consistently from the beginning defined the tax as one upon the property itself. The case of Minneapolis & St. Louis R'y Co. v. Koerner, 85 Minn. 149, is a striking illustration of that principle. We devoted much space to a discussion of two decisions of this court upon which we confidently relied as final and conclusive endorsements of our position. These decisions,

State v. St. Paul, Minneapolis & Manitoba R'y Co., 30 Minn., 311,

State v. St. Paul Union Depot Co., 42 Minn. 142,

stand undistinguished and, we believe, undistinguishable. They apply the very rule which we invoke.

We directed attention specifically to the present law which requires railroad companies to report all their gross earnings and to pay into the treasury of the state a percentage thereof—without any provision for deduction—and declares that such tax shall be "in lieu of all taxes and assessments upon all property within this state owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof." Is it right in deciding this case to ignore these
78 decisions and this statute? We appeal to the fairness of the court.

With the utmost earnestness, sincerity and respect we submit that an opportunity for re-argument should be granted.

FRANK B. KELLOGG,
C. A. SEVERANCE,
ROBERT E. OLDS,
W. S. CARTER,
Attorneys for Appellant.

THOMAS CREIGH,
Of Counsel.

79 19134.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 297.

STATE OF MINNESOTA, Respondent,
vs.
CUDAHY PACKING COMPANY, Appellant.

Ordered, that the petition for reargument herein be and it hereby is in all things denied.
Dated March 30, 1915.
By the Court.

CALVIN L. BROWN,
Chief Justice.

(Endorsed:) Filed March 30, 1915. I. A. Caswell, Clerk.

80 19134.

Supreme Court of Minnesota.

STATE OF MINN.
vs.
THE CUDAHY PACKING CO.

It is hereby stipulated that judgment may be entered in this Court for the total sum of $3,272.71, which includes interest on the Judgment of the District Court to this date, and costs in this Court.
Dated July 29, 1915.

(Signed) LYNDON A. SMITH, *Attorney General;*
WILLIAM J. STEVENSON,
Ass't Att'y Gen'l,
For the State.
DAVIS, KELLOGG & SEVERANCE,
Attorneys for Cudahy Packing Co.

Filed July 29, 1915. I. A. Caswell, Clerk.

81 19134. State of Minnesota, Supreme Court. State of Minnesota, Respondent, vs. Cudahy Packing Co., Appellant. Judgment Roll. Filed July 29, 1915. I. A. Caswell, Clerk.

82 19134. State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed July 29, A. D. 1915. I. A. Caswell, Clerk.

83 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 294.

STATE OF MINNESOTA, Respondent,
vs.
THE CODAHY PACKING COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that judgment be entered accordingly.

Entered March 5, A. D. 1915.

By THE COURT.

Attest:
I. A. CASWELL, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

I. A. CASWELL, *Clerk*.

84 19134. State of Minnesota, Supreme Court. Copy of Minutes of Argument. Filed July 29, 1915. I. A. Caswell, Clerk.

85 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1914.

Monday Morning, 9:30 o'clock, February, 8, A. D. 1915.

Court convened pursuant to adjournment.

Reg. No. 19134; Cal. No. 294.

STATE OF MINNESOTA, Respondent,
vs.
THE CODAHY PACKING COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

86 19134. State of Minnesota, Supreme Court. Transcript of Judgment. Filed July 29, 1915. I. A. Caswell, Clerk.

STATE OF MINNESOTTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, July 29, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

87 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 294.

STATE OF MINNESOTA, Respondent,
vs.
THE CODAHY PACKING COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause March 5, A. D. 1915,

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed, and it is further adjudged and determined that the Respondent above named do have and recover of said Appellant herein the sum and amount of Three Thousand Two Hundred Seventy-Two

and 71/100 Dollars ($3,272.71) which includes the judgment in the district court, and interest thereon to date, and the costs and disbursements in this Court, and that execution may be entered for the enforcement thereof.

Dated and signed July 29, A. D. 1915.

By THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

88 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of State of Minnesota, Respondent, vs. Cudahy Packing Company, Respondent, and also of the opinion of the Court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in St. Paul, Minnesota, this 20th day of August, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

89 In the Supreme Court of the State of Minnesota.

THE CUDAHY PACKING COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Præcipe for Transcript.

To the Clerk of the above entitled court:

You will please prepare a transcript of the record in this case to be filed in the office of the Clerk of the United States Supreme Court under the writ of error heretofore allowed by said court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Transcript from District Court of Ramsey County, consisting of the following: Summons; complaint, answer; reply; court's findings of fact and conclusions of law, and memorandum; stipulation of facts; articles of incorporation and amendments; stipulation and order settling case; judgment; notice of appeal with admission of service and waiver of bond; and clerk's certificate.
2. Assignments of error in the District Court.
3. Opinion of Supreme Court of Minnesota.
4. Petition for rehearing in Supreme Court of Minnesota.
5. Order denying petition for rehearing.

6. Order for judgment in Supreme Court.
7. Transcript of judgment in Supreme Court.
8. Assignments of error in Supreme Court of Minnesota.
9. Petition for writ of error.
10. Order allowing writ of error.
11. Bond on writ of error.
12. Writ of error.
13. Citation and service.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States.

DAVIS, KELLOGG & SEVERANCE,
Attorneys for said Plaintiff in Error.

[Endorsed:] 19134. Filed Aug. 19, 1915. I. A. Caswell, Clerk.

90 In the Supreme Court of the State of Minnesota.

THE CUDAHY PACKING COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error in the above entitled cause, and avers and shows that in the records and proceedings in said cause, the Supreme Court of the State of Minnesota erred, to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

First. The earnings of the plaintiff in error involved in this case were in the form of car rentals or mileage receipts derived from the use of its cars by railroad companies to which they were leased during the period covered by the complaint. These earnings (computed at the rate of one cent for each mile traveled) were based upon mileage made by said cars while in use in the transportation of freight in interstate commerce; that is to say, between points outside of Minnesota and points within Minnesota, or between points of origin and destination both outside of Minnesota but involving passage through Minnesota in transit. The State claimed, and the Supreme Court of the state has sustained, the right to tax such earnings by appropriating a fixed percentage of so much thereof as was based upon mileage made by the cars within the state in the course of such interstate transportation. The said Supreme Court of the state erred in holding that said earnings were subject to tax-
91 ation by the State; the court should have held that the taxing of said earnings, or any part thereof by the State constituted an unlawful interference with and burden upon interstate commerce, and as such was in violation of Section 8 of Article 1 of the Constitution of the United States.

Second. The said Supreme Court erred in holding that the taxation of said earnings by the State as above described, was not deprivation of property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The said Supreme Court erred in holding that the provisions of Chapter 250 of the General Laws of Minnesota for 1907, the provisions of Chapter 473 of the General Laws of Minnesota for 1909 and the provisions of Chapter 377 of the General Laws of Minnesota for 1911—under the statutes the taxes herein involved were levied and sought to be collected—in so far as the same are construed to apply to and require the taxation of any or all of the earnings above described, are not in violation of Section 8 of Article 1 of the Constitution of the United States, nor in violation of the Fourteenth Amendment to said Constitution.

Fourth. The said Supreme Court erred in holding that the taxes herein sought to be collected by the State of Minnesota from the plaintiff in error with respect to its said cars and the earnings derived therefrom, constituted a fair and just equivalent of a property tax upon said cars for the period or periods covered by said taxes; the court should have held that said taxes were in excess of a fair and just equivalent of a property tax upon said cars, and that the plaintiff in error was thereby denied the equal protection of the laws,
92 and deprived of its property without due process of law—in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fifth. The said Supreme Court erred in holding that the said taxes sought to be collected by the State from the plaintiff in error did not operate to deprive the plaintiff in error of its property without due process of law in this: that the said cars of the plaintiff in error had been otherwise fully assessed and taxed at their full and true value by and through the operation and effect of the gross earnings tax paid by the railroads by which respectively the said cars were operated. The said Supreme Court should have held that the said attempt of the State to tax the so-called earnings of the plaintiff in error derived from said cars amounted to double taxation, and operated to deprive the plaintiff in error of its property without due process of law and to deprive the plaintiff in error of the equal protection of the laws—in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Sixth. The said Supreme Court erred in holding that the taxation by the State of Minnesota of the said earnings as aforesaid, did not involve the taxation of property of the plaintiff in error situated beyond the limits of the State of Minnesota, and did not therefore amount to a deprivation of property without due process of law—in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Seventh. The said Supreme Court erred in holding that the said tax was one upon the property of the plaintiff in error situated within the State of Minnesota; the court should have held that said tax was upon the earnings of the plaintiff in error arising from the

transaction of interstate commerce, and as such amounted to a burden upon, and interference with, its right to engage in and
93 carry on interstate commerce within the State of Minnesota, and was a regulation of, and interference with, interstate commerce—in violation of the provisions of Section 8 of Article 1 of the Constitution of the United States.

Eighth. The said Supreme Court erred in refusing to reverse the judgment of the trial court, and in failing to give to the plaintiff in error its rights under the Constitution of the United States, as claimed and set forth in the record in said cause.

Wherefore, said Cudahy Packing Company, plaintiff in error, prays that said judgment may be reversed, annulled and held for naught, and that it may be restored to all things which it has lost by occasion of said judgment.

CUDAHY PACKING COMPANY,
By DAVIS, KELLOGG AND SEVERANCE, AND
THOMAS CREIGH,
Its Attornys.

94 [Endorsed:] 19134. Original. In the Supreme Court, State of Minnesota, —— County, —— Court. Cudahy Packing Co., Plaintiff in Error, vs. The State of Minnesota, Defendant in Error. Assignments of Error. Thomas Creigh and Davis, Kellogg & Severance, Attorneys for Pl'ff in Error, Merchants National Bank Building, St. Paul, Minn. Filed Aug. 13, 1915. I. A. Caswell, Clerk.

95 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA, Respondent,
vs.
THE CUDAHY PACKING COMPANY, Appellant.

Petition for Writ of Error.

The petition of The Cudahy Packing Company, the appellant in the above entitled cause, respectfully shows unto Your Honor:

1st. The said cause of action is a cause of action commenced by the respondent above named against your petitioner to recover taxes based upon various items of gross earnings alleged to be due from your petitioner for the years 1907 to 1912 inclusive. The totel amount for which said respondent demanded judgment against your petitioner was the sum of Two Thousand, One Hundred, Eleven Dollars and Ten Cents ($2,111.10) taxes, and Six Hundred, Twenty-six Dollars and Eighty-one Cents ($626.81) accrued penalties up to the date of the commencement of said action. Said cause of action is based upon and maintained under the law relating to the taxation of freight line companies, embraced in the following statutory provisions: Chapter 250, General Laws of Minnesota of

1907; Chapter 97, General Laws of Minnesota of 1909; Chapter 473, General Laws of Minnesota of 1909, and Chapter 377, General Laws of Minnesota of 1911.

2nd. The items of gross earnings upon which the said respondent claims the right under said law to levy and collect taxes consists of earnings derived by your petitioner from the rental of
96 refrigerator cars to railroad companies. This rental is based upon a fixed rate of One Cent (1¢) per mile traveled by each car, and is the only revenue derived by your petitioner therefrom. This mileage made by said cars in Minnesota in transporting shipments between points within the State, or transporting shipments in interstate commerce, has been made up of substantially the following car movements:

(*a*) From points outside the State of Minnesota to points within the State of Minnesota.

(*b*) From points outside the State of Minnesota to other points outside the State of Minnesota, involving transportation, however, through the State of Minnesota.

(*c*) From points within the State of Minnesota to other points within the State of Minnesota.

The amount sought to be recovered from your petitioner by respondent in said action is arrived at by treating as earnings subject to taxation the car mileage compensation derived by your petitioner from the railroad companies in accordance with the car movements above stated.

Your petitioner, in and by its answer filed in said cause, contended that at no time during the period covered by the complaint was it a freight line company or a car line company, as defined by Chapter 250 of the General Laws of 1907, as amended by Chapter 473 of the General Laws of 1909, or as defined by Chapter 377 of the General Laws of 1911, or by any other statute of the State of Minnesota; that during all of the said period covered by the complaint the railroad companies operating and transporting said cars were duly assessed and paid taxes upon the earnings derived from the operation of said cars in the State of Minnesota, under and pursuant to the terms of the gross earnings tax law of the State of Minnesota applicable to railway companies, to-wit: Chapter 253 of the General Laws of Minnesota for 1903, Sections 1003 to 1011 inclusive of the Revised Laws of Minnesota of 1905; that the taxes sought to be assessed and collected in said action were not assessed in con-
97 formity with the rules of assessment and taxation applicable to other personal property throughout the State, and that your petitioner was thereby denied the equal protection of the laws and was deprived of its property within due process of law, contrary to the provisions of the Constitution of the United States; that the taxes sought to be assessed and collected in said action were taxes upon earnings derived from the carrying on of interstate commerce and that the attempt to tax the same constituted an unwarranted interference with and burden upon such commerce, contrary to the provisions of the Constitution of the United States.

3rd. The said cause was commenced in the District Court of

Ramsey County, Minnesota, and after answer by your petitioner and reply by the respondent, all of the facts involved in said cause were duly embodied in a stipulation of the parties, and upon a trial of the issues, the said District Court of Ramsey County, Minnesota, decided and gave judgment against the aforesaid claims of your petitioner, whereupon your petitioner took an appeal to the Supreme Court of Minnesota, and in said court, upon said appeal, your petitioner renewed its said claims as to the invalidity and unconstitutionality of said claims for taxes by the respondent, as hereinabove set forth. The said Supreme Court of the State of Minnesota, upon the hearing of said appeal, affirmed the order and judgment of said District Court of Ramsey County.

4th. On the 29th day of July, 1915, final judgment, in accordance with the said order of the Supreme Court of the State of Minnesota, was duly entered and rendered, by said Supreme Court of the State of Minnesota, for the sum of three thousand two hundred seventy-two and 71/100 ($3272.71). The said Supreme Court of the State of Minnesota was and is the tribunal having jurisdiction
98 under the laws of Minnesota to render final judgment in all proceedings and actions of the nature of the above entitled cause, and the said judgment is the final judgment in said cause in behalf of the State of Minnesota and against your petitioner.

Said final judgment of the Supreme Court of the State of Minnesota was against each and all of the rights so claimed by your petitioner in said cause, all of which will more fully appear by the record in said proceedings now remaining in said Supreme Court.

Wherefore, For as much as your petitioner believes that there was manifest error in said decision of said court against the several claims of your petitioner as hereinbefore set forth and in the final judgment in said action or proceeding which is to the great damage of your petitioner, your petitioner prays that Your Honor will examine the records of said Supreme Court of the State of Minnesota in this behalf and allow your petitioner a writ of error, to the end that said judgment and record may be brought before the Supreme Court of the United States, agreeably to the laws of the United States in that behalf enacted.

Dated this 2nd day of August, A. D. 1915.

THE CUDAHY PACKING COMPANY,
By DAVIS, KELLOGG & SEVERANCE,
Its Attorneys.

99 [Endorsed:] 19134. Supreme Court of the State of Minnesota. State of Minnesota, Respondent, vs. The Cudahy Packing Company, Appellant. Petition for Writ of Error. Filed this — day of ——, 1915. —— ——, Clerk. Davis, Kellogg & Severance, Attorneys for Appellant, Merchants Nat'l Bank Building, Saint Paul, Minnesota. Filed Aug. 13, 1915. I. A. Caswell.

100 In the Supreme Court of the State of Minnesota.

THE CUDAHY PACKING COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Bond.

Know all men by these presents, that we, The Cudahy Packing Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois as principal, and National Surety Company of New York, a corporation, as surety, are held and firmly bound unto the State of Minnesota in the sum of Three Thousand five hundred Dollars ($3,500.00) to be paid to the State of Minnesota, for which payment well and truly to be made, we bind ourselves and each of us and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of July in the year of our Lord, one thousand, nine hundred and fifteen.

Whereas, the above named The Cudahy Packing Company, Plaintiff in error, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Minnesota.

Now, therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its writ of error to effect, and answer all costs and damages that may be judged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

THE CUDAHY PACKING COMPANY,
By DAVIS, KELLOGG & SEVERANCE,
Its Attorneys.

[CORPORATE SEAL.]
NATIONAL SURETY COMPANY,
By C. M. BEND,
Its Attorney in Fact.

In presence of
FRED DESCH,
GERTRUDE E. SCHABER,
As to Principal.
WM. B. JOYCE, JR.,
DAN J. YORK,
As to Surety.

Approved Aug. 13th, 1915.

CALVIN L. BROWN.

101 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 29th day of July, A. D. 1915, personally appeared before me C. M. Bend to me personally known, who being by me duly sworn, did depose and say: that he is attorney in fact of the Natonal Surety Company, the corporation described in and which executed the foregoing instrument, that the seal affixed to said instrument is the corporate seal of said corporation by authority of its Board of Directors, and said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] WM. B. JOYCE, JR.,
Notary Public, Ramsey County, Minnesota.

My commission expires Fed. 9th, 1921.

102 [Endorsed:] 19134. Filed Aug. 13, 1015. I. A. Caswell, Clerk.

103 In the Supreme Court of the United States.

THE CUDAHY PACKING COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Cudahy Packing Company, a corporation, appellant and plaintiff in error, and the State of Minnesota, respondent and defendant in error, wherein was drawn into question the validity of a statute of and an authority exercised under said State of Minnesota, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, and wherein was drawn into question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege and exemption specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said The Cudahy Packing Company, plain-
104 tiff in error, as by its complaint appears, we being willing that error if any hath been, should be duly corrected and full and speedy justice — to the parties aforesaid in this behalf, do

command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first day of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of August, A. D. 1915.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk for the United States District Court
for the District of Minnesota.
By MARGARET L. MULLANE,
Deputy Clerk.

Allowed by:
CALVIN L. BROWN,
Chief Justice of the Supreme Court
of the State of Minnesota.

Service of the foregoing writ of error this 13th day of August, 1915, is hereby admitted.

LYNDON A. SMITH,
Attorney General of the State of Minnesota.

105 [Endorsed:] 19134. Supreme Court of the United States. The Cudahy Packing Company, Plaintiff in Error, vs. State of Minnesota, Defendant in Error. Writ of Error. Filed this — day of ——, 1915. —— ——, Clerk. Davis, Kellogg & Severance, Attorneys for Plaintiff in Error, Merchants National Bank Building, Saint Paul, Minnesota. Filed Aug. 13, 1915. I. A. Caswell, Clerk.

106 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA, Respondent,
vs.
THE CUDAHY PACKING COMPANY, Appellant.

Order Allowing Writ of Error.

On reading and considering the petition of The Cudahy Packing Company, appellant in the above entitled cause, praying that a writ of error be allowed returnable into the Supreme Court of the

United States to review the judgment of the Supreme Court of the State of Minnesota in the above entitled cause, entered on the 29th day of July, 1915, and upon the filing of an assignment of errors,

It is ordered that a writ of error be and hereby is allowed, as prayed for, and that the amount of the bond on said writ of error be and hereby is fixed at three thousand five hundred dollars ($3,500.00), which bond shall operate as a supersedeas.

Dated this 13th day of Aug., A. D. 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of Minnesota.

107 [Endorsed:] 19134. Supreme Court of the State of Minnesota. State of Minnesota, Respondent, vs. The Cudahy Packing Company, Appellant. Order Allowing Writ of Error. Filed this — day of ——, 1915. —— ——, Clerk. Filed Aug. 13, 1915. I. A. Caswell, Clerk. Davis, Kellogg & Severance, Attorneys for Appellant, Merchants National Bank Building, Saint Paul, Minnesota.

108 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on August 13, 1915, in the matter of State of Minnesota, Respondent, vs. Cudahy Packing Company, Appellant;

(1) The original bond, of which a copy is herein set forth;

(2) One Writ of Error, as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in St. Paul, Minnesota, this 20th day of August, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk of Supreme Court of Minnesota.

109 In the Supreme Court of the United States.

THE CUDAHY PACKING COMPANY, Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, Defendant in Error.

Citation.

The United States of America to the State of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Minnesota, wherein The Cudahy Packing Company is plaintiff in error and you

are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 13th day of Aug., A. D. 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

Service of the foregoing citation this 13th day of August, 1915, is hereby admitted.

LYNDON A. SMITH,
Attorney General of the State of Minnesota.

110 [Endorsed:] 19134. Supreme Court of the United States. The Cudahy Packing Company, Plaintiff in Error, vs. State of Minnesota, Defendant in Error. Citation. Filed this — day of ——, 1915. —— ——, Clerk. Davis, Kellogg & Severance, Attorneys for Plaintiff in Error, Merchants National Bank Building, Saint Paul, Minnesota. Filed Aug. 13, 1915. I. A. Caswell, Clerk.

111 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within Writ, I herewith return to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Minnesota, in the City of St. Paul, this 20th day of August, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of Transcript $27.75 paid by Cudahy Packing Company.

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 24,895. Minnesota Supreme Court. Term No. 230. The Cudahy Packing Company, plaintiff in error, vs. The State of Minnesota. Filed August 28th, 1915. File No. 24,895.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. [redacted] 32

THE CUDAHY PACKING COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR.

FRANK B. KELLOGG,
CORDENIO A. SEVERANCE,
ROBERT E. OLDS,
THOMAS CREIGH,

Attorneys for Plaintiff in Error.

THE PIONEER COMPANY, ST. PAUL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 230.

THE CUDAHY PACKING COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought by the State of Minnesota against the Cudahy Packing Company, plaintiff in error, to recover certain gross earnings taxes for the years 1907 to 1912 inclusive. The taxes are claimed under a statute defining freight line companies and taxing them on the

gross earnings plan. Whether the plaintiff in error fell within the statutory definition of a freight line company was a preliminary question which has been finally determined in the affirmative. It need no longer concern us because this court will follow the construction placed upon the statute by the Supreme Court of Minnesota.

The facts are all embodied in a stipulation which appears on page 14 of the transcript of record. The trial court adopted and found the facts as there set forth. (Trans. of Rec. pg. 12)

The articles of incorporation of the Plaintiff in Error appear in the record (p. 24). They give the charter powers of the company as follows:

> "The object for which said corporation is formed is to purchase for slaughter, and slaughter cattle, hogs and sheep and manufacture and dispose of the products thereof; also to buy, sell, and deal in meats, provisions and all classes of produce and packing house products."

The stipulation shows that the company's packing plants are located at Sioux City, Iowa, Kansas City, Missouri, and South Omaha, Nebraska; that for the purpose of marketing the products of these packing houses the company maintains selling agencies or branch houses at various points in the United States, and, among other places, at St. Paul, Minneapolis and Duluth

in the state of Minnesota. During all of the years under consideration the company had both real and personal property to a very substantial amount in Minnesota, which was assessed and taxed in the ordinary way without any reference to a gross earnings system of taxation.

It further appears by the stipulation that in carrying on the business of the country a custom has been established by which shippers whose products call for special types of cars, such as refrigerator cars, oil tank cars, and coal cars, provide these cars and lease them to the various railway companies over whose lines their products move. This custom, it is recited, has grown up partly because the railway companies have failed to furnish the special types of cars in sufficient numbers and with proper dispatch to enable the business of such shippers to be conveniently, economically and expeditiously transacted. The practice by which each shipper or class of shippers owns and provides the particular type and substantially the number of cars adapted to his or its necessities has been found by experience to secure the best results both for the shipper and for the railway company. It is customary for the railway companies to pay to the owners of the cars for the use thereof, a rental which is computed at a fixed rate per mile traveled by each car. The rate varies in different parts of the country and as between different

classes of cars; but in Minnesota, which comes under the Western Freight Classification, the charge is one cent per mile run. (See Subdivision II of the Stipulation, Trans. of Rec. p. 16). These rates appear in the published tariffs of the railway companies.

Pursuant to the custom above indicated, the Cudahy Packing Company provided certain refrigerator cars and rented them to the railway companies on the terms named in the published tariffs. There is no connection between the rentals so paid by the railway companies and the freight charges on products carried in the cars. The usual and lawful tariff freight rates on products so carried have been at all times collected from the shippers and retained by the railway companies. In actual practice the cars were loaded by the packing company at its packing houses, and were then hauled by the railroad companies to points designated by the packing company. After they were unloaded at their respective points of destination, the cars were taken to their respective points of origin or to such other places as the packing company might designate. Under normal conditions, the cars were either used in carrying the products of the packing company from place to place, or were being returned empty over the same route for other loads of such products. Under the car service rules of the railway companies a shipper

so providing a refrigerator car is entitled to a return movement of the car to the point of origin, but the railway company does in fact carry a load in the car on the return movement wherever it is practicable to do so, so that there shall be as little empty movement as possible. Repairs on the cars are made by the railway companies and charged to the owner, except where the repairs are made necessary by negligent handling. The stipulation (Subd. II, Trans. of Rec. p. 17) contains this paragraph:

> "Except for the designation of points of destination and the routing of shipments as above described, the defendant does not have, nor has it at any time had any control whatever over the movement and handling of its said cars while they have been in the hands of the carriers, and said cars have at all times been in all respects, so far as such movement and handling are concerned, subject to the exclusive control of the carriers in the same manner as other car equipment owned and used by them."

The only revenue which the packing company derives from its cars is the rental of one cent per mile traveled, which is paid by the railway companies.

The demand of the State in this proceeding is made up by treating as taxable earnings the car mileage compensation so received from the railroad companies, and taking a percentage thereof

as provided by the statute already mentioned. Save for a limited movement of peddler cars, so-called, which travel at stated intervals from branch houses located in Minnesota to other points in Minnesota, all of the mileage upon which the earnings sought to be taxed are computed, is interstate. The stipulation says that substantially ninety per cent of the mileage is interstate, and substantially ten per cent intrastate; and then proceeds to classify as follows the car movements which go to make up the entire mileage:

> "A. From packing houses outside of Minnesota to branch houses within the State of Minnesota, an average of eleven cars per week.
>
> B. From packing houses outside the State of Minnesota to branch houses beyond Minnesota involving transportation through Minnesota, an average of four cars per week.
>
> C. So-called "peddler cars" loaded at Minnesota branches and consigned to points in Minnesota, an average of four cars per week.
>
> D. So-called "peddler cars" loaded at packing houses outside the State of Minnesota and consigned to various points in Minnesota, an average of five cars per week."

The packing company made certain reports under protest during the years in question. Ex-

hibit A attached to the complaint (Trans. of Rec. p. 5) schedules the earnings reported and omitted. In 1907 the packing company reported the total mileage compensation received by it on account of mileage made by its cars in Minnesota, both in interstate and intrastate business, but it did not include in the report earnings derived from the mileage in Minnesota of cars which simply traveled through the state from a point of origin outside Minnesota to a point of destination also outside Minnesota. The report for the year 1912, it seems, was made on the same basis. For the intervening years 1908 to 1911 inclusive, the earnings designated on Exhibit A as reported, comprise the compensation or car mileage received by the packing company computed on the basis of strictly intrastate movements of its cars. The earnings designated on Exhibit A as omitted, comprise the packing company's rentals received from the railroad companies based on car mileage arrived at by taking the Minnesota proportion of interstate mileage made by the cars coming into, running out of, or going through the state.

It is clear, therefore, that about ninety per cent of the earnings sought to be levied upon by taking a precentage thereof, is made up of revenue in the form of rentals computed on a car mileage basis covering the interstate movement of the cars. The packing company for four of the

years in question, reported under protest only its car mileage receipts derived strictly from the intrastate movement of its cars. For the other two years it reported the entire Minnesota mileage receipts, from both local and interstate movements, except that no part of the receipts from mileage made by the cars passing through the State was reported. In any event, it is quite obvious that the rentals based on intrastate mileage can be easily separated out for each year. The State claims its percentage on all mileage receipts or rentals computed on mileage made by the cars in Minnesota, whether the trips be interstate or intrastate. For example, if a car travels through Minnesota between points both outside the state, the rental of one cent for each mile traveled by such car in Minnesota must be reported and a percentage thereof turned over to the State. Likewise the receipts represented by Minnesota mileage must be reported on all cars traveling between points one of which lies within the state.

Railway companies over whose lines the cars traveled have, as already indicated, charged and received the full lawful tariff freight rates upon all products carried in the cars; and the total gross freight earnings derived by such railway companies from the operation of the cars in Minnesota, including not only all earnings on business beginning and ending in Minnesota, but also

a proportion computed on a mileage basis of all earnings on interstate shipments hauled in these cars, have been reported by the railroads and a percentage thereof levied upon by the State. There is, however, this qualification to be noted: since January 1, 1907, the railway companies in making reports for taxation, have arbitrarily deducted from their total gross freight receipts the rentals of one cent a mile for each car, paid to the packing company, apparently on the theory that such rentals were on the same footing as payments to other railroad companies for use of equipment. The decision of the Supreme Court of Minnesota in State v. Minnesota & International Railway Co. 106 Minn. 176, following a prior decision of the Supreme Court of Wisconsin in State v. McFettridge, 64 Wis. 130, authorizes railroads in reporting gross earnings for taxation, to strike a balance between all amounts paid out to other railroad companies and received from other companies on account of rent of equipment and to report for taxation only the excess amount received over and above the amount paid out. The rule was stated by the Minnesota court as follows:

> "Where accounts are kept between different companies and charges are adjusted for such service, up to the point where the accounts balance, the operation is a mere exchange of the use of cars, but the amount

> received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings."

This rule obviously is designed to meet the particular situation to which it refers: namely, where two railroads in the normal course of business exchange equipment and make reciprocal charges. It is a patent misapplication of the rule to call it into operation here. The packing company and the railway company do not exchange equipment, and there are no reciprocal charges and no balance to be struck. The fact that the railway companies, in reporting their gross earnings, have deducted the rentals paid to the owner of the cars is by no means conclusive. The right to make such a deduction has never been passed upon by the courts, and there seems to be absolutely no reason why the deduction should be permitted. The Minnesota & International case is certainly not authority for it, and it cannot be justified on principle. The considerations which prompted the court in that case to make an exception of car service balances cannot be here invoked.

The stipulation shows that the average number of cars per day in Minnesota for all of the years in question was 10 in 1907, 11 in 1908, and

12 for each of the years 1909 to 1912, inclusive. The actual cash value of these cars varied from $700 to $900 each, depending upon the length of time the car had been in use. Consequently, the maximum value of all cars in Minnesota for each year engaged in all classes of service was as follows:

1907	$9,000
1908	9,900
1909	10,800
1910	10,800
1911	10,800
1912	10,800

The average rate of taxation applicable to personal property throughout the State is given as follows:

1907	25.91 mills
1908	26.98 mills
1909	27.79 mills
1910	27.92 mills
1911	29.67 mills
1912	27.74 mills

Applying these rates to the maximum valuations above given we get the following amounts as the taxes which would have been paid on the cars each year, if they had been taxed in the ordinary way as personal property:

1907	$233.19
1908	267.10
1909	300.13

1910	301.54
1911	320.45
1912	299.59
Total	$1,722.00

The State's demand in this action, exclusive of penalties and interest, is for $2111.10. It should be kept in mind that the State has already collected from the railway companies on the same "lieu" tax theory a manifestly much larger sum arrived at by taking four per cent. of the freight receipts arising from the operation of the cars. The tax on railroad gross earnings is declared by the statute to be

> "In lieu of all taxes and assessments upon all property within this state owned *or operated* for railway purposes by such company, *including equipment,* appurtenances, appendages and franchises thereof."

The opinion of the Supreme Court of Minnesota (Transcript of Record, p. 39) was filed March 5, 1915. A petition for rehearing (Transcript of Record, p. 42) was presented and denied without any further opinion being filed.

The opinion of the State Court was principally devoted to the question of statutory construction. The contentions that the tax was not a fair equivalent of a property tax and that it constituted an unlawful burden on interstate commerce were dealt with as follows:

"The contention that the tax demanded is not a fair equivalent of a tax upon the cars or property itself, does not appear to have sufficient merit to require discussion; and the proposition that the tax is an unlawful burden on interstate commerce is answered by State v. United States Express Co., 114 Minn. 346, affirmed in 223 U. S. 355."

II.

SPECIFICATION OF ERRORS RELIED UPON.

First. The earnings of the plaintiff in error involved in this case were in the form of car rentals or mileage receipts derived from the use of its cars by railroad companies to which they were leased during the period covered by the complaint. These earnings (computed at the rate of one cent for each mile traveled) were based upon mileage made by said cars while in use in the transportation of freight in interstate commerce; that is to say, between points outside of Minnesota and points within Minnesota, or between points of origin and destination both outside of Minnesota but involving passage through Minnesota in transit. The State claimed, and the Supreme Court of the State has sustained, the right to tax such earnings by appropriating a fixed percentage of so much thereof as was based upon mileage made by the cars within the state in the course of such interstate transportation. The said Supreme Court of the State erred in holding that said earnings were subject to taxation by the State; the court should have held that the taxing of said earnings, or any part thereof by the State constituted an unlawful interference with and burden upon interstate

commerce, and as such was in violation of Section 8 of Article 1 of the Constitution of the United States.

Second. The said Supreme Court erred in holding that the taxation of said earnings by the State as above described, was not deprivation of property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The said Supreme Court erred in holding that the provisions of Chapter 250 of the General Laws of Minnesota for 1907, the provisions of Chapter 473 of the General Laws of Minnesota for 1909 and the provisions of Chapter 377 of the General Laws of Minnesota for 1911—under which statutes the taxes herein involved were levied and sought to be collected—in so far as the same are construed to apply to and require the taxation of any or all of the earnings above described, are not in violation of Section 8 of Article 1 of the Constitution of the United States, nor in violation of the Fourteenth Amendment to said Constitution.

Fourth. The said Supreme Court erred in holding that the taxes herein sought to be collected by the State of Minnesota from the plaintiff in error, with respect to its said cars and the earnings derived therefrom, constituted a fair and just equivalent of a property tax upon

said cars for the period or periods covered by said taxes; the court should have held that said taxes were in excess of a fair and just equixalent of a property tax upon said cars, and that the plaintiff in error was thereby denied the equal protection of the laws, and deprived of its property without due process of law—in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fifth. The said Supreme Court erred in holding that the said taxes sought to be collected by the State from the plaintiff in error did not operate to deprive the plaintiff in error of its property without due process of law in this: that the said cars of the plaintiff in error had been otherwise fully assessed and taxed at their full and true value by and through the operation and effect of the gross earnings tax paid by the railroads by which respectively the said cars were operated. The said Supreme Court should have held that the said attempt of the State to tax the so-called earnings of the plaintiff in error derived from said cars amounted to double taxation, and operated to deprive the plaintiff in error of its property without due process of law and to deprive the plaintiff in error of the equal protection of the laws—in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Sixth. The said Supreme Court erred in

holding that the taxation by the State of Minnesota of the said earnings as aforesaid, did not involve the taxation of property of the plaintiff in error situated beyond the limits of the State of Minnesota, and did not therefore amount to a deprivation of property without due process of law—in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Seventh. The said Supreme Court erred in holding that the said tax was one upon the property of the plaintiff in error situated within the State of Minnesota; the court should have held that said tax was upon the earnings of the plaintiff in error arising from the transaction of interstate commerce, and as such amounted to a burden upon, and interference with, its right to engage in and carry on interstate commerce within the State of Minnesota, and was a regulation of, and interference with, interstate commerce—in violation of the provisions of Section 8 of Article 1 of the Constitution of the United States.

Eighth. The said Supreme Court erred in refusing to reverse the judgment of the trial court, and in failing to give to the plaintiff in error its rights under the Constitution of the United States, as claimed and set fort hin the record in said cause.

III.

BRIEF OF ARGUMENT.

A. THE TAX IS AIMED SO DIRECTLY AT THE RECEIPTS FROM INTERSTATE COMMERCE AS TO BE AN UNLAWFUL BURDEN UPON SUCH COMMERCE.

There is no fixed rule for determining in all cases just when a tax of this nature ceases to be a lawful tax measured by gross receipts, and becomes and unlawful burden upon interstate commerce. As we view the matter, the court has not attempted—at least in recent years—to lay down any working rule of general application. The fundamental principle, however, has been made perfectly plain. A reasonable latitude must be accorded the states in levying taxes. Under modern conditions, a very considerable amount of property is employd in carrying on interstate commerce. Manifestly, the commerce clause should not be so broadly construed and applied as to confer upon this property immunity from state taxation. The familiar unit system, approved in Adams Express Co. v. Ohio, 165 U. S. 227, and kindred cases, need only be referred to. There is no doubt whatever that the states are entitled to tax the instrumentalities of commerce and that in so doing they may take into account "intangible values," so-called. The

unit system is one method of reaching a fair valuation. But it is not the only method. The gross earnings system of taxation is another approved plan for arriving at the same result. It is with this latter method that we are here concerned.

The view long prevailed that any gross earnings tax involving the appropriation of a percentage of earnings derived from interstate commerce was invalid. This was a rather hasty deduction from some of the earlier decisions of this court. It is now clear that no such sweeping generalization can be made. No proposition is more definitely established than that the State may use such earnings as a measure of value for the property sought to be taxed. The court has recognized that a tax upon interstate earnings may not always be the burden on interstate commerce which it appears to be. The question has been held to be a practical one, to be determined upon the facts of each case. If the State is merely attempting in good faith to reach and value property lawfully subject to taxation within its borders, its action will not be set aside simply because interstate earnings are used as a standard or measure of value. On the other hand, if, under the circumstances, the tax may be said to be so directly aimed at those earnings as to evidence an intention to levy upon them as such, the court

has not hesitated to declare the tax void as an unlawful burden upon interstate commerce.

The difficulty has come, of course, in applying the principle to the particular case.

The first case of this nature which arose was State Tax on Railway Gross Receipts, 15 Wall. 285. The Pennsylvania statute there under consideration required every locally incorporated railroad company to pay semi-annually a tax of three-fourth of one per cent. of its gross receipts. The State applied the tax to receipts derived in part from freight carried to and from other states. The tax was upheld by this court on two grounds: first, that it was not a tax upon the transportation itself, but upon the receipts after they had become commingled with the general mass of property within the state; second, that it was sustainable as a franchise tax, the gross receipts being used as a measure of value.

At the same term of court, State Freight Tax, 15 Wall. 232, was decided. This was a tonnage tax. The Pennsylvania law required railway companies to pay a specified sum for each ton of freight carried. The court held that an attempt to apply this tax to tonnage representing freight which crossed the state line amounted to a regulation in violation of the commerce clause. In the opinion by Justice Strong, it was held:

> "The payment of that tax is a condition upon which is made dependent the prose-

> cution of this branch of commerce, and as there is no limit to the rate of taxation she may impose, is she can tax at all, it is obvious the condition may be made so onerous that interchange of commodities with other states would be rendered impossible."

The holding in State Tax on Railway Gross Receipts was not directly called into question for about fourteen years. The so-called "Granger Cases" and others relating to the power of the states to deal with interstate rates intervened.

Railroad Co. v. Maryland, 21 Wall. 456.
Peik v. Chicago & Northwestern R. Co., 94 U. S. 164.
Munn v. Illinois, 94 U. S. 133.
Chicago, Burlington & Quincy R. Co. v. Iowa 94 U. S. 155.
Wabash, St. Louis & Pacific R. Co. v. Illinois, 118 U. S. 557.

In 1887, Fargo v. Michigan, 121 U. S. 230, was decided on facts virtually identical with those of the present case. A Michigan statute construed by the Supreme Court of that state to impose a tax upon the interstate receipts (apportioned on a mileage basis) of a fast freight line company, derived from the mileage rentals of its cars, was held to be a regulation forbidden by the commerce clause. We shall discuss this case more at length hereafter; at this point we call attention to the fact that the second ground of

decision in State Tax on Railway Gross Receipts —that the tax might be sustained as one upon the franchise—was overruled.

The next case of importance was Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, decided in 1887. Again a Pennsylvania law was involved; this time providing for a tax of a fixed percentage upon the gross receipts of every company carrying on a transportation, telegraph or express business. The steamship company was a Pennsylvania corporation engaged in carrying persons and property by sea between different states and to and from foreign countries. The specific question presented was whether the State might tax the company's gross receipts "derived from freight and passage money between the ports of Philadelphia and Savannah, and in foreign trade from New Orleans, and a small amount for charter parties in the like trade." It was held that the tax was a regulation of and interference with interstate commerce because it was levied directly upon the receipts derived from such commerce. In the opinion by Justice Bradley, it was said (p. 335):

> "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation

was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. * * * If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.'

Such a position can hardly be said to be based on a sound method of reasoning.' "

The first ground of decision in State Tax on Railway Gross Receipts—that the tax might be regarded as one upon the receipts after they had become commingled with the general mass of personal property within the state, and therefore not as a tax upon the transportation itself—was considered and expressly overruled. Consequently, by 1887 both of the grounds upon which the Gross Receipts Tax Case in 15th Wallace rested had been taken away, so that the case no longer had any support or authority.

Pursuing the development of the subject, we find the court in the following year (1888), in Ratterman v. Western Union Telegraph Co., 127 U. S. 411, carefully drawing the distinction between receipts derived from interstate business and those from commerce entirely within the limits of the state. The tax there was assessed under an Ohio statute, and covered receipts of the telegraph company derived from both classes of business. An agreed statement of facts, however, showed the interstate and intrastate earnings separately. The court approved and affirmed a decree which sustained the tax so far as it affected intrastate earnings, and held it invalid "only in proportion to the extent that such receipts were derived from interstate commerce." In the opinion by Justice Miller, who

also wrote the opinion in Fargo v. Michigan, the court said (p. 424):

> "Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid. * * * Where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax upon interstate commerce while permitting the State to collect that arising from commerce solely within its own territory. * * *
>
> "Under these views we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation and apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent, that such receipts were derived from interstate commerce. Concurring, therefore, with the circuit judge in his action, enjoining the collection of the taxes on

> that portion of the receipts derived from interstate commerce and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is Affirmed."

In the same volume appears Leloup v. Port of Mobile, 127 U. S. 640 (1888), where the court held that a general license tax imposed upon telegraph companies as a condition of doing business was a tax upon the business itself and therefore unconstitutional as applied to a company engaged in transmitting messages between states. The opinion by Justice Bradley says (p. 648):

> "In our opinion such a construction of the Constitution leads to the conslusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

In arriving at this conclusion, the court declined to follow Osborne v. Mobile, 16 Wall. 479 (1872); and did not hesitate to say that the

course of decision since 1872 had made it certain that the ordinance sustained in the Osborne case (imposing an annual license tax on express companies, graded so as to exact a maximum fee from companies doing an interstate business) would have to be regarded as repugnant to the power conferred upon Congress under the commerce clause. Evidently, by 1888 the court had definitely abandoned the position taken sixteen years before.

The Ratterman case was followed in Western Union Telegraph Co. v. Pennsylvania, 128 U. S. 39, which came up from Pennsylvania in the same year upon a similar state of facts.

Western Union Telegraph Co. v. Ala., 132 U. S. 472, decided in 1889, involved a statute which imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The company in the first instance made a report to the Board of Assessors covering only its receipts from business transacted wholly within the state. The Board then required, and was furnished, a further return covering gross receipts from messages transmitted partly within and partly without the state. The tax was imposed upon the gross receipts as shown by both returns. The tax imposed upon receipts from messages comprised in the second return was held unconstitutional as a regulation of interstate

commerce; and the case was accordingly sent back by this court so as to enable the two classes of receipts to be properly separated and the tax to be imposed upon the receipts from messages carried wholly within the state.

In Lying v. Mich., 135 U. S. 161 (1890), a case not especially apposite on the facts, the facts, the court defined its general attitude as follows (p. 166):

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. Leloup v. Mobile, 127 U. S. 640, 648, and cases cited."

In Crutcher v. Kentucky, 141 U. S. 47 (1891) a Kentucky statute requiring express companies to take out a license as a condition for doing any business in the state was considered. Under this law companies having a capital of less than $150,000 were barred. It was held that, as applied to a corporation engaged in interstate commerce, the statute was void.

In Pacific Express Co. v. Seibert, 142 U. S. 339 (1892), where by construction the state

statute was saved from invalidity, the court said (p. 349):

> "It is well settled that a State cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on; for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress."

Up to this point, with the single exception of the Gross Receipts Case decided in 1872 and afterwards overruled, the court was practically united in declaring without any qualification that interstate commerce and the receipts arising therefrom could not be regulated or taxed by a state. It was, of course, inevitable that from the maze of local statutes framed to fall within the rule and still secure to the state governments as great a share as possible of taxes from corporations engaged in interstate commerce, a case should sooner or later arise to divide the court. This case was Maine v. Grand Trunk R. Co., 142 U. S. 217, submitted in 1891 and decided in December of that year. It involved a Maine statute which, at least in form, differed materially from those which had previously come to the notice of the court. By Section 1, the lands of every railway outside of its located right of

way, and all of its buildings, were declared subject to taxation as other property was taxed, by the several cities and towns in which such buildings and lands were situated. By Section 2, every corporation, person or association operating a railroad in the State was required to pay an annual excise tax for the privilege of exercising its franchise in the state, which, with the tax provided for in Section 1, was to be in lieu of all taxes upon such railroad, its property and stock. Section 3 fixed the amount of the tax as follows:

> "The amount of the gross transportation receipts as returned to the railroad commissioners for the year ending on the thirtieth day of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars and do not exceed three thousand dollars, the tax shall be equal to one-half of one per centum of the gross receipts; and so on increasing the rate of the tax one-quarter of one per centum for each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof,

> provided, the rate shall in no event exceed three and one-quarter per centum. When a railroad lies partly within and partly without this state, or is operated as a part of a line or system extending beyond this state, the tax shall be equal to the same proportion of the gross receipts in this state, as herein provided, and its amount determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile multiplied by the number of miles operated within this state."

It will be observed that the tax purported to be an annual excise tax; that the amount was fixed by percentages, varying up to a certain limit, of the average gross receipts per mile multiplied by the number of miles operated within the state when the road extended outside; that the tax was not levied directly upon the gross receipts; that the entire scheme of the statute justified the inference that the legislature was attempting in good faith to reach the value of the property per mile and not to tax the receipts as such. Notwithstanding these distinctions, Justices Bradley, Harlan, Lamar and Brown were of the opinion that the case was not dis-

tinguishable from Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326. After reviewing the line of cases to which we have referred, they said in a dissenting opinion written by Justice Bradley:

> "We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation."

The majority of the court, however, found a distinction between the case before them and the cases previously decided; and they accordingly upheld the tax. Justice Field, delivering the majority opinion, said:

> "There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred. * * *
>
> "The case of Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, there-

> fore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

Manifestly, the distinction which appealed to the majority of the court was that in the earlier case the tax was directly and in terms upon the gross receipts, while in the later case it was not. Here we find the suggestion that the gross receipts, including those derived from interstate commerce, may properly serve the purpose of a yardstick or measure of value. It should also be noted that the majority emphatically disclaimed any intention of modifying in the slightest degree the doctrine of the Philadelphia Steamship Case.

Apparently, the court looked upon the Grand Trunk case as a sort of detour made necessary by the peculiar facts; because it resumed its progress along the path marked out by the earlier cases, although from now on dissents are a little more frequent.

In Postal Telegraph Co. v. Adams, 155 U. S. 688 (1895), a Mississippi law imposing a privilege tax upon various corporations, including telegraph and express companies, was sustained. The tax was graduated according to the amount and value of the property measured by miles, was declared to be in lieu of other state, county and municipal taxes, and was shown to be less than

the amount which would have been collected if the property had been subjected to a single ad valorem tax. The majority opinion by Chief Justice Fuller began as follows (pp. 695-969):

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

Justices Brewer and Harlan dissented, filing the following opinion by Justice Brewer (p. 701):

> "Mr. Justice Harlan and I are unable to concur in the foregoing decision. We are of opinion that the act of the State of Mississippi, fairly construed, imposes a tax upon the plaintiff in error for the privilege of doing within the limits of the State the business of an interstate carrier of telegraphic messages, and is, therefore, a regulation of interstate commerce; and that this characteristic of the tax is not affected by the question whether the amount thereof be more or less than the sum which the company would have had to pay if its property had been subjected to the ordinary property tax levied for state, county, and municipal purposes."

Erie Railroad v. Pennsylvania, 158 U. S. 431 (1895), presents a significant distinction. There the Pennsylvania statute imposed a tax of a fixed percentage upon gross receipts for "tolls and transportation." A toll had been defined by the Pennsylvania courts as a "tribute or custom paid for passage, not for carriage—always something taken for a liberty or privilege, not for a service." The precise question was whether the law so construed was applicable to tolls paid by one company to another for the use of its railroad, where the paying company was engaged in interstate transportation. The court upheld the tax upon the ground that it was not laid upon

the interstate transportation or upon the receipts derived therefrom. The interference with interstate commerce, if any, was conjectural, remote and indirect. The court said (p. 437):

> "In support of this contention numerous decisions of this court are cited, in which it has been held that state statutes which levy taxes upon gross receipts of railroads for the carriage of freights and passengers into, out of, or through the State put a burthen upon commerce among the States, and are therefore void.
>
> It is needless to review the cases cited, because we regard the proposition they are quoted to sustain as thoroughly established; that is the principle of those cases applicable to this. * * *
>
> The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received. * * *
>
> It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be interference with interstate commerce. The interference with the commercial power must be direct, and not the mere

> incidental effect of the requirement of the usual proportional contribution to public maintenance."

In Louisville & Nashville Rd. v. Kentucky, 161 U. S. 677, 896, it was contended that the assumption by the State of a right to forbid the consolidation of parallel and competing lines involved an interference with the power of Congress under the commerce clause. Dealing with this contention, the court took occasion to discuss the general principle as follows (p. 701):

> "The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less, according to the policy of the State within which the railroads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden."

Another border line case in which the court found itself again seriously divided was Galveston, Harrisburg & San Antonio Railroad Co. v.

Texas, 210 U. S. 217, decided in 1908. Suit was brought by the State of Texas in its own courts to recover taxes and penalties under an act entitled, "An act imposing a tax upon railroad companies * * * and other persons * * * owning * * * or controlling any line of railroad in this state * * * equal to one per cent of their gross receipts * * * and repealing the existing tax on the gross passenger earnings of railroads."

Section 1 imposed upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the state."

Section 2 required a report under oath of "the gross receipts of such line of railroad from every source whatever for the year ending on the 30th day of June last preceding," and exacted immediate payment of the tax "calculated on the gross receipts so reported." The railroad company was located wholly within the state, but connected with other lines which ran outside; and a part of the receipts sought to be taxed was derived from the carriage of passengers and freight coming from or destined to points without the state. The question whether as to this portion of the receipts the case should be governed by the Philadelphia Steamship Case or by Maine v. Grand Trunk Railway Co. was fairly presented and squarely met. A majority

of the court declared the tax void. The opinion was by Mr. Justice Holmes. He first reviewed the earlier decisions. Evidently in the argument the Philadelphia Steamship Case and the Grand Trunk Case were pitted against each other, and the court felt a real difficulty in attempting to reconcile them. At the same time, there was no disposition to overrule or even modify either of these decisions. Concerning the earlier one, Mr. Justice Holmes said (p. 224):

> "In Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

Concerning the Grand Trunk Case he said (p. 226):

> "In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 'an annual excise tax for the privilege of exercising its franchise,' was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company case. But it may

not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax was to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax."

Running through the opinion is the fundamental idea—fully expressed, we believe, for the first time,—that the distinction to be taken is a practical rather than a logical one. For example:

((pp. 225-227) "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. * * * * * * *

By whatever name the exaction may be called, 'if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 697. See New York, Lake Erie & Western R. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps, from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by

name or form. Stockard v. Morgan, 185 U. S. 27, 37; Asbell v. Kansas, 209 U. S. 251, 254, 256."

Applying these principles to the case in hand, the opinion concludes (pp. 227-228):

"We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

The Galveston case is most illuminating. Thenceforward the pragmatic view seems to be consistently and deliberately applied by the court in dealing with this class of cases. So far as the legal reasoning—or rather the conscious ex-

pression of it—is concerned, the case may perhaps be said to mark a sort of turning point.

We do not understand that the four justices who dissented in the Galveston case differed from the majority on the basic principles involved. Justice Harlan's opinion arrives at the conclusion that, as a matter of construction, the Texas statute did not evidence an intention to levy upon the interstate receipts as such.

In Western Union Telegraph Co. v. Kansas, 216 U. S. 1, and Pullman Co. v. Kansas, 216 U. S. 56, the question was whether a Kansas statute requiring foreign corporations, as a condition upon the right to continue to do local business, to pay for the benefit of the permanent school fund of the state a given per cent of their authorized capital could be sustained. The statute was declared void because in effect it imposed a tax upon the interstate business of such companies, as well as upon their property situated beyond the limits of the state. Justice Harlan, who wrote the opinion, stated the point in the Galveston case as follows (p. 24):

> "The contention by the railroad company was that the tax was a burden on interstate commerce, and invalid, so far as it was *based on* or was measured by receipts derived from interstate transportation. That view was sustained."

On the general principle involved, the court said (p. 26):

> "W eare aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form af a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent *in fact* on the value of its property *situated within the State.*' Postal Telegraph Co. v. Adams, 155 U. S. 688, 696; Leloup v. Mobile, 127 U. S. 640, 649. * * *
>
> But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

In Ludwig v. Western Union Telegraph Co.,

216 U. S. 146, the validity of a state law imposing a license tax on foreign corporations was discussed from the point of view of intention or lack of intention to impose a tax on interstate business. The court held, on the authority of the Kansas cases, the statute was unconstitutional. In the course of the opinion Justice Harlan said (p. 162):

> "The validity of a statute, whatever its language, must be determined by its effect or operation as manifested by the natural and reasonable meaning of the words employed."

and that,

> "If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the state legislature may not have intended to enact an invalid statute."

In the Ludwig case the intention was sought to be shown by proving the course of previous legislation on the same subject. The court held, however, that the statute before it must stand or fall by its own terms.

In Flint v. Stone, Tracy Co., 220 U. S. 107, the court, referring to the Galveston case, said:

> "The tax was held void, as its substance

> and manifest intent was to tax interstate commerce as such."

In the Corporation Tax Cases, the Galveston and Grand Trunk Railway decisions were cited in the course of a discussion of the proposition that the measure of taxation may include, in part at least, property which as such could not be directly taxed.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298 (1912), was a bill for an injunction against a tax alleged to be unconstitutional as a regulation of interstate commerce. The statute required certain corporations, including express companies, to pay,

> (p. 299) "'a gross revenue tax * * * which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its receipts as the portion of its business done within the state bears to the whole of its business;' with a proviso for fixing a different proportion if it 'more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bear to its total gross receipts.' By

> § 3 the per centum to be paid by express companies (such as the plaintiff), is three per cent. of the gross receipts, and, 'for the purpose of determining the amount of such tax,' they are required to report under oath the gross receipts 'from every source whatsoever."

The company's receipts were largely from interstate commerce, and it also received large sums from investments outside of Oklahoma. The court held that, viewing the tax as a property tax, it was bad, within the rule laid down in Fargo v. Hart, 193 U. S. 490. The conclusion was reached, however, that it was not in fact a property tax, but was a tax levied directly upon the interstate receipts, and therefore bad within the rule of the Galveston case. The court said (p. 302):

> "It is not simply a tax on all gross receipts within the State, which possibly might be read as intended to reach such receipts as it could, even if less than all. Ratterman v. Western Union Telegraph Co., 127 U. S. 411. It is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the State has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

Submitted and decided simultaneously with the Oklahoma case was United States Express Co. v. Minnesota, 223 U. S. 335. It is important to note carefully the facts in the Minnesota case. The express company was engaged in both local and interstate business over certain railroads running into and through Minnesota. The statute required the company to file reports "showing the entire receipts, including all sums earned or charged, whether received or not, for business done within the state, including its proportion of gross receipts for business done in the state by such company in connection with other companies." After deducting from such gross receipts the sums paid by the company annually to the railroads for the transportation of freight within the state, the auditor was directed to assess upon the balance a tax of six per cent., which was declared to be "in lieu of all taxes upon its property." The State sued for this tax upon certain items of earnings which had been omitted from the returns for past years. These items covered exclusively earnings on business done by the company between points in Minnesota. As to one class of these earnings, it appeared that they were derived from the transportation of merchandise between two local points, which transportation, however, involved passing into or through another state en route. It was contended by the company that the looping

into another state in transit made the business and the earnings therefrom interstate in character so as to deprive the State of the right to levy upon the earnings.

Another item of earnings involved was that derived from "interstate transfer business," so-called. The stipulation of facts defined them as follows (p. 340):

> "Earnings derived by the company from the following express shipments: (a) Shipments received by an express company from a shipper at a point of origin outside of the State of Minnesota addressed to and destined to a consignee within the State of Minnesota; or (b) shipments delivered to an express company by a shipper in the State of Minnesota and addressed to and destined to a cosignee without the State of Minnesota; or (c) shipments delivered to an express company by a shipper without the State of Minnesota and addressed to and destined to a consignee without the State of Minnesota, passing through the State of Minnesota in transit, as to all of which said shipments, either in class a, class b, or class c, the defendant received said shipments at a point in the State of Minnesota and forwarded them over its lines to a second point within the state of Minnesota, the transportation while in the hands of the defendant being performed wholly within the State of Minnesota. The transportation in connection with such shipments outside of the State

> of Minnesota was performed by connecting companies other than the defendant. Each of said shipments which constituted said amount of $9,702.89 in Schedule No. 2 of paragraph III of complaint was made upon a through rate and a through waybill and bill of lading showing the origin and ultimate destination thereof, and consisted of a single transportation transaction commencing with the delivery by the shipper to the express company and continuing until and not ending before the delivery of the shipment to the consignee at the point of ultimate destination to which the shipment was addressed."

The company contended that although the service it performed did not involve any part of the carriage across the state line in either direction, still the fact that the shipments themselves were interstate was sufficient to make a levy upon the earnings an unlawful burden upon interstate commerce.

With respect to the first item of earnings above mentioned—those derived from transportation between local points but passing into an adjoining state en route——the court held on the authority of Lehigh Valley R. Co. v. Penna., 145 U. S. 192, that such a tax was not an interference with interstate commerce. The earnings not only could be, but had been, apportioned on a mileage basis, so that the State was only attempting to

tax a proportion, based upon the Minnesota mileage. The court has since discussed the same point in Ewing v. City of Leavenworth, 226 U. S. 464, where the earlier case of Hanley v. Kansas City So. Railway Co., 187 U. S. 617, is distinguished.

Passing to the other items—earnings from interstate transfer business—the court noted: first, the holding of the Minnesota Supreme Court that it was the intention of the legislature to include such earnings within the operation of the law; second, that the transportation in connection with which the receipts were earned was interstate commerce; and, third, that the general rule condemns a tax upon such commerce as one form of burden or interference. Fargo v. Michigan, the Philadelphia Steamship Case, the Galveston Case, and other authorities were here cited. The opinion then proceeds (p. 343):

> "While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails

> or income from the conduct of such commerce."

The court next referred to the Grand Trunk Case, saying (p. 343):

> "The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the power of the State."

Next, after brief discussions of Wisconsin & Michigan Railway Co. v. Powers, 191 U. S. 379, and Flint v. Stone Tracy Co., 220 U. S. 107, Mr. Justice Day said (pp. 344-347):

> "The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. Postal Telegraph Co. v. Adams, 155 U. S. 688; Pullman's Palace Car Co. v. Pennsylvania, 141, U. S. 18; Ficklen v. Shelby County, 145 U. S. 1, 22. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. supra, wherein the possible differences between the decisions in Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. supra, and Maine v Grand Trunk

Ry. Co., 142 U. S. supra, were commented upon and explained. . . .

In that case the statute of Texas was condemned, because it appeared to the court to be an attempt to reach the receipts from interstate commerce by a tax of one per cent., or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the state court and the argument on behalf of the State that another tax on the property had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax or in any way helped by the words 'equal to.'

Upon like reasoning the statute of Oklahoma was condemned in the case of Oklahoma v. Wells, Fargo & Co., decided to-day, ante, p. 298.

Appreciating the difficulty emphasized in the Galveston case of drawing the line between taxes that burden interstate commerce and those whereby the legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the State, which, under their construction of the tax, included the earnings here in question. That

court held that the statute was part of a system long in force in Minnesota, passed under the authority of the state constitution, and was intended to afford a means of valuing the property of the express companies within the State. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. * * *

The tax in the present case is not like those held invalid in the Galveston case and the Oklahoma Case, being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of the property of such companies in the State, measured by the receipts from business done within the State. The statute was not aimed exclusively at the avails of interstate commerce (Philadelphia Steamship Co. v. Pennsylvania, supra), but, as in the Maine Case, was an attempt to measure the

> amount of tax within the admitted power of the State by income derived, in part, from the conduct of interstate commerce."

The opinion concludes (p. 348):

> "Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State."

The Minnesota express tax decision is a direct application of the reasoning laid down in the Galveston case. We have seen that in the Oklahoma tax case, decided at the same time, the Court condemned the statute as one designed (like the Texas law) to tax the interstate receipts as such. The Minnesota statute, however, was "upon the whole," regarded as falling within the class where there had been an exercise in good faith of a legitimate taxing power, the measure of which taxation was in part proceeds of interstate commerce. Reading the opinion as a whole one gains the impression that this case came rather close to the line. The rigid application of the rule laid down in the Philadelphia steamship case would certainly have brought

a different result; but applying the practical test of the Galveston case, there can be little doubt that the conclusion was justified by the particular facts. There was good reason for saying that the state had disclosed no definite purpose of taxing the interstate receipts as such. Perhaps the most significant fact in the case was that the state was waiving any claim to a percentage of receipts derived by the company from its strictly interstate business. The express company was not only handling shipments between points in Minnesota; it was also handling them between Minnesota points and outside points, and was transporting them through Minnesota between points of origin and destination both of which lay outside the state. There was no attempt by the state to touch the earnings arising from this "in and out" and "through" business as carried on by the express company. The state deliberately confined its tax to the earnings from shipments as to which the entire service of the company consisted in carrying them from one point in Minnesota to another point in Minnesota. So far as the company was concerned, it was purely intrastate transportation, and the earnings were intrastate earnings. The company's contention that the tax should not be permitted because the shipments themselves were transferred either to or from another company which carried them across the state line to or from an

outside point, was necessarily technical. The state could well say to the company: "So far as you are concerned these earnings are local; your service begins and ends in Minnesota; you have nothing to do with the interstate haul which is performed by another company. We make no claim to any part of your earnings where you perform an interstate service." The court itself emphasized the point at the very outset after quoting the stipulation on this subject. Mr. Justice Day said:

> "Taxes are not claimed or collected upon shipments of express matter in the classes named, where the same express company performs the transportation service both within and without the state of Minnesota."

The state's deliberate waiver of any such claim was fairly conclusive on the point that the state was not aiming at the interstate receipts as such. No better evidence of good faith in that regard could have been presented. In the face of such a showing, the court could hardly say that there was "a manifest attempt to burden the conduct of interstate commerce."

We do not find that later decisions have materially affected the situation. Brief references to the principal cases we have discussed will be found in:

Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 82-3;

Ohio Tax Cases, 232 U. S. 576, 593;

St. Louis Southwestern R'y Co. v. Arkansas, 235 U. S. 350, 362-3;

Johnson v. Wells Fargo & Co. 239 U. S. 234, 244;

Kansas City R'y Co. v. Kansas, 240 U. S. 227.

In Baltic Mining Co. v. Massachusetts, the court said:

> (Pp. 82-83) "While this is true, other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from taxation. United States Express Co. v. Minnesota, 223 U. S. 335, 344. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. Maine v. Grand Trunk Railway Co., 142 U. S. 217; Provident Institution v. Massachusetts, 6 Wall. 611; Hamilton Co. v. Massachusetts, 6 Wall. 632; Flint v. Stone Tracy Co., 220 U. S. 107, 162-5; United States Express Co. v. Minnesota, supra."

In the Ohio Tax cases the court said:

> (P. 593) "It is, of course, entirely settled that a State cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. Galveston, Harrisburg &c. Ry. Co. v. Texas, 210 U. S. 217, 225, 229; United States Express Co. v. Minnesota, 223 U. S. 335, 344; Williams v. Tallageda, 226 U. S. 404. 416; Baltic Mining Co. v. Massachusetts, 232 U. S. 68, 82."

In St. Louis Southwestern R'y v. Arkansas, the court said:

> (P. 362) "We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State. * * *
>
> The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, as in Maine v. Grand Trunk Ry., 142 U. S. 217; Wisconsin v. Michigan

Ry. v. Powers, 191 U. S. 379; Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217; Oklahoma v. Wells, Fargo & Co., 223 U. S. 298; and U. S. Express Co. v. Minnesota, 223 U. S. 335."

In Kansas City R'y v. Kansas, the court said:

(Pp. 231-232) "It must be assumed, in accordance with repeated decisions, that the State cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. State Freight Tax Cases, 15 Wall. 232; Philadelphia & Southern S. Co. v. Pennsylvania, 122 U. S. 326, 336, 344; Leloup v. Mobile, 127 U. S. 640; Lyng v Michigan, 135 U. S. 161, 166; McCall v. Califfornia, 136 U. S. 104; Galveston, Harrisburg &c. Ry. v. Texas, 210 U. S. 217, 228; West Un. Tel. Co. v. Kansas, 216 U. S. 1, 36, 37; Pullman Co. v. Kansas, 216 U. S. 56, 65; Meyer v. Wells, Fargo & Co., 223 U. S. 298; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83. And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce laws, our decision must regard the substance of the exaction—its operation and the manner in which the taxing scheme has been characterized. Galveston, Harrisburg &c. Ry. v. Texas, supra; U. S. Expr. Co. v. Minnesota, 223 U. S. 335,

346; St. Louis Southwestern Ry. v. Arkansas Ry. 235 U. S. 362. * * * * *

On the other hand, in U. S. Exp. Co. v. Minnesota, supra, it appeared that the reference to gross receipts was only intended fairly to measure a tax upon a subject within the taxing power of the State, and the tax was sustained."

The question comes to this: Do the facts in the case now pending bring it within the class represented by Fargo v. Michigan and the Galveston case, or do they cause it to fall on the other side of the line into the class represented by Maine v. Grand Trunk Railway and the Minnesota express tax case? If the latter disposition is made, it would seem clear, in the light of the facts, that the line of decisions favoring the power of the states in this matter will be considerably strengthened. In that event, we should unquestionably find ourselves much further along the path toward a complete recognition of the right of the states to tax the receipts from interstate commerce than we now are.

Adopting the suggestion in Baltic Mining Co. v. Massachusetts, supra, that "every case involving the validity of a tax must be decided upon its own facts," and that in construing past decisions, "the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases," we face this precise situa-

tion: there are just two previous cases which stand out among all the others as useful guides for interpreting the facts now presented. They are Fargo v. Michigan, 121 U. S. 230, and United States Express Co. v. Minnesota, 223 U. S. 335. On the basis of similarity of facts one or the other of these cases must be accorded a powerful, if not a controlling influence.

Fargo v. Michigan was decided in 1886. The Michigan statute there under consideration appears as No. 152 of the Public Acts of Michigan for the year 1883, and is entitled: "An Act to provide for the taxation of persons, copartnerships, associations, car loaning companies, corporations and fast freight lines engaged in the business of running cars over any of the railroads of this State, and not being exclusively the property of any railroad company paying taxes on their gross receipts." Section 1 provided:

> "That every person, copartnership, corporation, association, car loaning company or fast freight line engaged in the business of running cars over any of the railroads of this State, and not being exclusively the property of any railroad company paying taxes in this State, on their gross receipts, who are or may hereafter be engaged in the business of carrying passengers in any palace, drawing-room, sleeping, chair, or other

car over or upon any railroad in this State, or any part thereof, for the right of occupancy of which passengers are required to pay a sum additional to that charged upon the ordinary cars of the road over which said palace, drawing-room, sleeping, chair, or other car, as aforesaid may be hauled, shall keep, in such manner as shall be prescribed by the commissioner of railroads, a just and true account of all sums so received by them as additional charges for the occupancy of such cars *over any road or portion thereof, within the limits of this State,* and shall on or before the first day of April of each year, report to said commissioner of railroads, on blanks to be furnished by him for such purpose, *the gross amount of such receipts as aforesaid, earned within the limits of this State,* for the year ending on the thirty-first day of December next preceding the date of such report."

Section 2 required persons, corporations, etc., owning, running or interested in fast freight lines, etc., to keep accounts and make reports as provided in section 1 in the case of palace, drawing-room and other passenger cars. Section 3 provided for the verification of such reports. Section 4 required the commissioner of railroads to make and file a computation of the amount of tax, based upon the report so made, and provided penalties for failure to report. Section 5 read as follows:

"Every corporation, association, copartnership, car loaning company, or person, as specified in sections one and two of this act shall, on or before the first day of July in each year, pay to the State Treasurer, upon the statement of the auditor-general, an annual tax of two and one-half per cent upon their gross receipts as computed by the commissioner of railroads, and derived from passengers or from the loaning, renting or hiring these cars to any railroad or other corporation, association, copartnership or party, *and such taxes shall be in lieu of all other taxes upon the cars used for the purposes mentioned in sections one and two of* this act.

The remainder of the act dealt with the mode of collecting the tax.

It was sought to apply this tax to the earnings of the Merchants Despatch Transportation Company. That company was the owner of certain freight cars which were used and run by various railroad companies running into and through the State of Michigan. For the use of the cars, the Merchants Despatch Transportation Company were paid a definite sum per mile for the distance traveled by the cars over their respective lines. The mileage made by the cars was wholly interstate. They were not used at all for the carriage of freight between points situated within the State of Michigan. After the passage of the

act above mentioned, the Merchants Despatch Transportation Company filed a report showing its gross receipts for the mileage of its cars, subdivided as follows:

1. While in use in the transportation of freight between points without said state and passing through said state in transit, estimated and pro rated according to the mileage of said cars within said State of Michigan while so in use.....	$ 95,714.50
2. While in use of transportation of freight from points without to points within said State of Michigan, and from points within to points without said state, estimated and pro rated according to the mileage of said cars within the State of Michigan while so in use	28,890.01
Aggregate	$124,604.51

The return further showed that the company had received no moneys whatever on business done solely within the State of Michigan, and no moneys which could be regarded as earned during the year within the limits of the state other than as above set forth. There was no attempt to assess a tax on the first item covering

mileage made by the cars on "through" business. The second item, however, comprising receipts from mileage made on "in and out" business was subjected to the tax, whereupon suit was brought to enjoin its collection. The Supreme Court of Michigan sustained the tax, and that holding was reversed by this court. Justice Miller, at the very beginning of the opinion, called attention to the discrimination involved in taxing one item of interstate earnings without taxing the other.

> (P. 238) "There is nothing in the opinion of the Supreme Court of the state, which is found in the transcript of the record, to explain this discrimination. There is nothing in the statute of the state on which this tax rests which makes such a distinction, nor is there anything in the commissioner's requirement for a report which suggests it. It must have been, therefore, upon some idea of the authorities of the state that the one was interstate commerce and the other was not, which we are at a loss to comprehend. Freight carried from a point without the state to some point within the state of Michigan as the end of its voyage, and freight carried from some point within that state to other states, is as much commerce among the states as that which passes entirely through the state from its point of original shipment to its destination."

The position taken by the court is sufficiently shown by the following passages (p. 240):

"With reference to the utterances of this court until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the state legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by its Supreme Court in the present case, is forbidden as a regulation of commerce among the states ,the power to make which is withheld from the state.

* * * * * * * * * * * * *

(Pp. 243-244) The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is

> commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

It is difficult to detect any real distinction between Fargo v. Michigan and the case at bar. The Cudahy Company is in exactly the same position as that occupied by the Merchants Despatch Transportation Company. Its cars are used and operated by railroad companies in the same way, and its income from the operation of the cars is likewise in the form of definite sums per mile for the distance traveled by the cars. In Fargo v. Michigan, the State sought to levy upon a percentage of the receipts from mileage made by the cars in transporting goods from points outside of Michigan to points within the state and vice versa. Here, the car movements from which concededly 90 per cent of the mileage receipts are derived are also interstate, the only difference being that in the Michigan case no tax was assessed on receipts from mileage made in the course of transportation through or across the state, while Minnesota here proposes to levy upon its proportion of such receipts. If any-

thing, the intention to tax interstate earnings as such is a little clearer here than it was in the earlier case.

We cannot find that in all the years of serious debate on this subject Fargo v. Michigan has been qualified or even criticized. It has been cited frequently, and was cited without specific comment in United States Express Co. v. Minnesota, 223 U. S. 335, 343. The court in the Minnesota case was able to distinguish it, evidently on the ground we have already mentioned,—namely, that the earnings in the later case, while arising in connection with interstate shipments, were not interstate from the point of view of the service performed by the company against which the tax was assessed. The very circumstance, the absence of which enabled the court in the Minnesota Express Tax Case to say that there was no manifest intention to aim at the interstate receipts as such, is the cardinal fact before us here, as it was in Fargo v. Michigan. The State of Minnesota no longer says to the defendant: "As to all earnings which you derive from carrying goods into, out of, or through the state, we will let you alone; we will tax only such earnings as you derive by carrying goods from one point in Minnesota to another point in Minnesota." The State now avows its purpose of taxing directly the earnings arising from "in and out" and "through" business. The State Court now says

that this statute includes among taxable earnings not only the receipts from "interstate transfer business," so-called ,involved in the Express Tax Case, but also a mileage proportion of the receipts from business carried on wholly by the company taxed between points, the location of one or both of which is outside the state. Clearly, we have here an important additional disclosure affecting the State's intention with respect to taxing interstate earnings. Has not the scope of the State's demand been sensibly enlarged by this further declaration of its highest court that the State is striking not merely at the earnings on business done beween points within the state (even though the shipments themselves may be carried across the state line by another company), but also at a mileage proportion of the strictly interstate earnings of the company taxed? Can we still say that the intention to levy upon the interstate earnings as such is not clear enough to justify the condemnation of the tax?

Under the next branch of the argument we shall point out that this tax has been imposed with an utter disregard for the principle that it should be a fair equivalent for the ordinary property tax. It is unnecessary to dwell upon the point that such a fact of itself has an important bearing upon the question, whether the interstate receipts are directly aimed at or not.

B. THE TAX IS NOT A FAIR EQUIVALENT FOR THE ORDINARY PROPERTY TAX.

A gross earnings tax is essentially a substituted form of taxation. It represents a system or method—presumably more convenient to administer—of reaching the same result as would be accomplished by an *ad valorem* property tax. Unless it does arrive at the same result, it cannot be justified. The theory is that the earnings themselves are not taxed at all, but that they are merely taken into account as a convenient measure of the value of the property from the use of which they arise. The gross earnings tax is a logical development from the doctrine that the value of property is often enhanced by its organic relation to a system. It is one of the devices resorted to for taking advantage of the concession that such property "may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items." The real value, it is said, of property employed as part of a system in carrying on commerce is best measured by what it earns in actual use. Another method of dealing with the same problem has been the so-called "unit" plan, which calls for an apportionment on some reasonable basis to the taxing state of its share of the total value of the whole plant or system valued as a unit.

the value of the entire capital stock being taken into account for that purpose. Adams Express Co. v. Ohio, 165 U. S. 194, 166 U. S. 171, is an example of this. Fargo v. Hart, 193 U. S. 490, shows an unfair, and therefore invalid, application of that method.

A comparison of the unit and gross earnings systems of taxation discloses obvious points of contrast, as well as of similarity. While both profess to aim ultimately at a fair tax upon property as such, the means adopted are radically different. The unit plan is frankly and consistently a property tax from every aspect. It does not purport to be anything else. Whether the basis of apportionment be mileage or volume of business done, the figure finally arrived at is a definite value of specific property subject to taxation as such.

The gross earnings tax, on the other hand, is, as we have said, a commuted or substituted tax. *Prima facie* it is not a property tax at all. It professes to be a levy upon earnings by exacting a fixed percentage thereof. The statutes by which such taxes are imposed usually recite that they are in lieu of a tax upon the property of the company a percentage of whose earnings are thus taken. There is no escaping the fact that *on its face* a levy upon earnings is in its direct effect a burden upon the operations which produce the earnings. When such a tax falls upon

earnings from interstate commerce, it can be justified only by showing that the tax is not really what it seems to be. As a direct levy upon such receipts, it is of necessity *prima facie* void, as a burden upon interstate commerce. It may not, however, be what it appears to be; for it may be shown that the aim of the State in imposing the tax was not in fact to reach the receipts as such, but merely to use them as a measure for the value of property, and that the tax itself thus arrived at is no more than a fair equivalent of what would have been received by the State by applying the ordinary property tax.

It is to be said that a valuation placed upon property by the authority charged with the duty of assessing it for taxation is presumed to be fair. In the case of a tax such as the one involved in Adams Express Co. v. Ohio, there is no apparent reason why the presumption should not be indulged. But is there any such presumption in favor of a commuted or substituted tax which, as here, depends for its validity upon a showing that it is in effect something different from what it appears to be? Are we to presume that any tax levied by a State upon receipts from interstate commerce is a valid property tax until the contrary is proved? In principle, ought not those who assert the validity of such a tax to be required to explain it and show that its *prima facie* effect is not its final effect? In other words,

a tax directly laid upon interstate receipts is manifestly a burden upon the operations giving rise to them, and should be held to be so in the absence of some showing that the receipts are not aimed at as such, but are used only as a measure of property value. This court has recently expressed accordant views in Foote v. Maryland, 232 U. S. 494. The case involved the validity of an inspection fee charged by the State for inspecting oysters shipped to Baltimore from Maryland, Virginia and New Jersey waters. The contention was that the fee, which was a flat one of a cent per bushel, was excessive; that it interfered with interstate commerce, and levied an unlawful impost duty upon goods shipped from other states. It appeared from the statute providing for the fee that the proceeds of the tax were to be used partly for inspection and partly for other purposes, such as policing state territory. The holding was that the tax was necessarily void as a burden on interstate commerce because in excess of the expenses absolutely necessary for inspection. The significant feature of the decision for our purpose is that the court treated the situation as one in which the presumption was against the validity of the tax. Mr. Justice Lamar, in the opinion, said (pp. 503-508):

> "But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the State imposes

upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge. * * * *

But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. For the presumption of invalidity arising from such intermingling might be met by carrying the burden of showing that, while the statute required payment out of such joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. * * * *

In the light of the operation of the previous act and the failure to show that the amount collected under the new, would not be more than was necessary for the expenses of inspection proper, the present statute must be held to be void. The excess collected may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other states."

Throughout its discussion of the subject this court has always been exceedingly careful to reserve the point that a gross earnings tax or any other form of commuted tax designed to reach

the value of the instrumentalities of interstate commerce, must, in any event, be a fair equivalent of what would have been paid if the property had been subjected to the ordinary property tax levied for state, county and municipal purposes.

In Postal Telegraph Co. v. Adams, 155 U. S., 688 the opinion (by Chief Justice Fuller) stated:

> (Pp. 695-6) "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper propor-

tion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

* * * * * * * * * * * *

Doubtless, no State could add to the taxation of property according to the rule of ordinary taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; ;but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland, Cincinnati &c. Railway v. Backus, 154 U. S. 439, 445. * * *

And in the case at bar, the Supreme Court in its examination of the liability of plaintiff in error for the taxes in question, said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second

count of the declaration and its exhibits whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single ad valorem tax.' This exposition of the statute brings it within the rule where ad valorem taxes are compounded or commuted for a just equivalent. determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power.

The act in prescribing the ascertainment of the charge as to telegraph companies operating less than one thousand miles of wire, was directed to reach a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem.*"

In United States Express Co. v. Minnesota, Mr. Justice Day said:

"There is no suggestion in the present record, as was shown in Fargo v. Hart, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made."

In St. Louis Southwestern R'y v. Arkansas, 235 U. S. 350, the court quoted with approval

the first and second paragraphs above set forth, from the opinion in Postal Telegraph Cable Co. v. Adams. After quoting the second passage, Mr. Justice Pitney said:

> (P. 367) "The language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445."

In Johnson v. Wells, Fargo & Co. 239 U. S. 234, where the tax was held to be in violation of the provision of the South Dakota state constitution requiring taxes to be levied on corporations by the same methods as those used for assessing and taxing individual property, the court, speaking of United States Express v. Minnesota, said:

> (P. 243) "In that case, the law was specifically authorized by the constitution of the State, as a means of reaching a proper

> valuation of the express companies' property within the State, in lieu of all other taxes. There was no contention in the case that the method used resulted in an excessive valuation."

The principle may thus be regarded as fully established. The state may employ any reasonable method of determining for taxation purposes the value of property used in carrying on interstate commerce. In so doing it may adopt the earnings as a yardstick or measure of value, and the fact that such earnings are derived in part from interstate commerce will not necessarily invalidate the tax. But the method must be fairly applied. The result must be "no more than the ordinary tax upon the property or a just equivalent therefor." The whole object of the method is to commute the property tax for a just equivalent. Anything beyond that would impose an added burden and be a palpable abuse of the method. In a proper case presenting the necessary facts, the court has indicated that it would have to declare the tax void.

We believe the facts here entitle us to invoke this principle. The contention so significantly absent in United States Express Co. v. Minnesota is now earnestly presented. The stipulation shows beyond any question the following facts:

First. The plaintiff in error is a packing company so-called, organized exclusively to buy live

stock, slaughter it, and market the products. It owns and pays taxes in the ordinary way on a very substantial amount of real and personal property in Minnesota. (Trans. of Rec. pp. 9 & 10). Its ownership of the cars is amply explained as a necessary incident of its normal business.

Second. The rentals paid by the railway companies for the use of the cars, on the basis of one cent per mile run, constitute the sole revenue which the plaintiff in error derives from its cars. It has no interest whatever in the freight charges on goods carried in them, which charges are made, collected and retained by the several railway companies at the usual published tariff rates.

Third. Under normal conditions the cars are used in transporting the packing company's products from place to place, or are being returned empty over the same route for other loads of the same products; but the railway companies handling the cars do, in actual practice, carry a load of other freight in the car on the return movement wherever it is practicable to do so. The stipulation recites:

> "Except for the designation of points of destination and the routing of shipments as above described, the defendant does not have nor has it at any time had any control whatever over the movement and handling of its said cars while they have been in the hands of the carriers, and said cars have at all

> times been in all respects so far as such movement and handling are concerned, subject to the exclusive control of the carriers in the same manner as other car equipment owned and used by them." (Transcript of Record p. 17.)

Fourth. The average number of cars so owned by the plaintiff in error and operated by the railroads throughout the period covered by the complaint is stipulated; as is also the average rate of taxation applicable to personal property throughout the State during each of the years involved. From the computation already given, it appears that applying these average rates to the maximum valuations of the cars, the taxes now demanded from the plaintiff in error on account of these cars plainly exceed by a very substantial amount the taxes which would have been collected from the plaintiff in error if the cars had been taxed on the ordinary ad valorem basis. The present demand, exclusive of interest and penalties, is for $2,111.10, in addition to what has already been paid by the plaintiff in error in each of the years in question. The total amount which could have been collected on the ad valorem basis foots up to $1,722.00.

Fifth. The railway companies over whose lines these cars have been operated have, under another gross earnings law applicable to them, paid as a tax, in lieu of all taxes and assessments

on this same equipment, four per cent. of their receipts from all freight carried in the cars. The Railroad Gross Earnings Law declares that such payment shall be "in lieu of all taxes and assessments upon all property within this state, owned *or operated* for railway purposes, * * * *including equipment*, appurtenances, appendages and franchises." (Transcript of Record, pp. 20, 21) Under the same law, the earnings so reported must include not only the earnings from business beginning and ending in Minnesota, but also a proportion based upon a proportion of the mileage within Minnesota to the entire mileage over which such business was done.

The situation is manifestly an extraordinary one. Even without taking into account the tax which the railroads paid, there is a wide discrepancy between the normal ad valorem tax on the cars and the amount the State has collected and seeks now to collect from the plaintiff in error as their owner. The theory of fair equivalence is plainly unsatisfied. And when we take into consideration the railroad payments, the magnitude of the discrepancy is so palpable as to admit of but one conclusion: that the State has proceeded with a reckless disregard for the principle. The tax paid by the railroads on account of these cars is not stipulated, and, as we have said, hardly admits of exact computation at this time. From the nature of things, however, a sum derived by

taking four per cent. of the freight receipts (less the car rentals) must be far in excess of any sum arrived at by taking six per cent. of the rentals. On the basis here stipulated, the lessor of the car would receive but $5.00 as rental for a five hundred mile run. No proof is necessary to show that the freight receipts from the operation of the car for any such distance would be many times $5.00. On any other hypothesis the railroad would be doing business at a ruinous loss. The stipulation, to be sure, shows that the railroad has in fact deducted from its return of gross receipts the mileage payments which it has paid to the lessor of the car for its use. The deduction is not adequately explained. The question of its legality has never been raised, and the statute plainly does not authorize it. All that can be said is that during the years in question the railroads, to the extent of the deduction, have not paid their full gross earnings tax. It is impossible to see how they can resist payment of the balance if the State sees fit to demand it. Such demand may be made at any time. *Non constat* that the State is not to-day enforcing the collection.

Nevertheless, with the evidence before us, it appears with mathematical certainty that the aggregate tax sought to be collected on account of these cars is far in excess of a just equivalent for an *ad valorem* tax. If six per cent. of the

mileage rentals received by the plaintiff in error (not even including the rentals on which it has voluntarily paid the taxes) will yield a tax of $2,111.10—a sum in itself substantially greater than the tax of $1,722.00 which would have been realized on the ad valorem basis—then the addition of four per cent. upon the total freight receipts (less the comparatively small mileage payments) brings the tax beyond any question up to a figure several times the *ad valorem* tax.

The action of the State in thus reaching out after a percentage of the earnings of both companies—the one which owns and the one which operates—in each case under a statute expressly declaring the tax to be in lieu of all other taxes and assessments upon the property, throws a flood of light upon its general purpose and intention. By a construction of the law which in itself evinces a pretty clear determination to go to extreme lengths in these matters, the Supreme Court of Minnesota has held this packing company to be a freight line company, engaged itself in operating the cars in the transportation business. The actual effect of both laws and of the construction of the State Court being as just described, and the tax itself being in terms levied upon the receipts from interstate commerce, there remains little, if anything, to be said in favor of the idea that the State is after all seeking only to tax the cars as property. Under all

of the circumstances, we feel amply justified in asserting that this case properly falls in the class of those where it is held that the statute, as construed by the highest court of the State, aims so directly at the receipts from interstate commerce as to be an unlawful burden upon such commerce.

Respectfully submitted,

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C. A. SEVERANCE.
ROBERT E. OLDS,
THOMAS CREIGH,
Attorneys for Plaintiff in Error.

CHAPTER 250 OF THE GENERAL LAWS OF MINNESOTA FOR 1907.

An Act to provide for the taxation of freight line companies.

Be it enacted by the Legislature of the State of Minnesota:

Freight line company defined.—Section 1. That any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars, not otherwise listed for taxation in Minnesota for the transportation of freight (whether such freight be owned by such company or any other person or company), over any railway line or lines, in whole or in part, within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator car, or by some other name, shall be deemed a freight line company.

To make annual statement of gross earnings.—Sec. 2. Every freight line company, person or persons, joint stock association or corporation engaged in the business of operating cars in this state as defined in section one (1), shall, annually between the first day of January and the first day of February, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer of such association or corporation, if an association or corporation, make and file with the state auditor of this state a statement showing the total gross earnings receiv-

ed from all sources from the operation of such freight car lines within this state, for the year ending December thirty-first (31st), next preceding.

Gross earnings defined.—Sec. 3. The term "the total gross earnings received from all sources from the operation of such freight car lines within this state," as used in section two (2) of this act is hereby declared and shall be construed to mean all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of mileage over which such business is done, of earnings on all interstate business passing through, or into or out of the state.

State auditor to make draft for 4 per cent. on gross earnings—disposition.—Sec. 4. It shall be the duty of the state auditor on or before the fifteenth (15th) day of February of each year to make his draft on such freight line company, person or persons, joint stock association or corporation, for a sum in the nature of a tax at four (4) per centum upon the gross earnings of such freight line company for the year ending the last day of December next preceding, as reported to the state auditor, and place the said draft in the hands of the state treasurer for collection; which shall be in lieu of all taxes upon all property of any freight line company so paying the same. All taxes collected by the state treasurer under the provisions of this act shall be paid into the state treasury and be credited to general revenue fund.

Penalty for non-compliance—provisions for enforcement.—Sec. 5. If any freight line company fails or refuses to pay said tax within thirty (30) days after a demand therefor shall

have been made by the state treasurer he shall thereupon add to the tax due a penalty of ten (10) per cent thereon for each subsequent month in which the tax remain unpaid; and if such taxes are not paid within sixty (60) days after demand therefor by the state treasurer he shall distrain sufficient goods and chattels belonging to such company charged with such taxes to be found within the State of Minnesota sufficient to pay the same, together with the penalty accrued thereon. The state treasurer shall immediately proceed to advertise in two (2) newspapers published in the county of Ramsey, stating the time and place where the property will be sold, and if the taxes for which such property is distrained and the penalties accruing thereon are not paid before the time appointed for such sale, which shall not be less than ten (10) days after the taking of such property, the state treasurer, or his deputy, shall proceed to sell such property at such public vendue or so much thereof as will be sufficient to pay such taxes and penalties and the costs of such distress and sale.

Sec. 6. All acts and parts of acts inconsistent with this act are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its passage.

Approved April 19, 1907.

CHAPTER 473 OF THE GENERAL LAWS OF MINNESOTA FOR 1909.

An Act to amend section 4 of chapter 250 of the Laws of 1907, being an act for the taxation of freight line companies.

Be it enacted by the Legislature of the State of Minnesota:

6 per cent tax on freight line companies.—Section 1. Section 4 of chapter 250, of the Laws of 1907, is hereby amended to read as follows:

Section 4. All such freight line companies shall on or before the fifteenth day of March in each year pay to the state treasurer of the state of Minnesota a sum of money equal to six per centum upon the gross earnings of such company for the year ending the last day of December next preceding, the same to be a tax upon its property during said year, and in lieu of all other taxes upon the same.

Said taxes shall be credited to the general revenue fund.

Upon failure to pay the same when due, the state auditor shall draw his warrant upon such companies therefor.

Approved April 23, 1909.

CHAPTER 377 OF THE GENERAL LAWS OF MINNESOTA FOR 1911.

An Act to provide for the taxation of freight line companies.

Be it enacted by the Legislature of the State of Minnesota:

Freight line company defined.—Section 1.—That any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars, or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in Minnesota, for the transportation of freight, (whether such cars be owned by such company or any other person or company), over any railway line or lines, in whole or in part, within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator car, or by some other name, shall be deemed a freight line company.

Situs defined.—Sec. 2. For the purpose of taxation all cars used exclusively within the state or used partially within and without the state, are hereby declared to have a situs in the state, the value of such property for the purpose of taxation is to be determined as provided by sections three and four of this act.

To make annual statement of gross earnings.—Sec. 3. Every freight line company, as hereinbefore defined (1) shall, annually between the first day of January and the first day of February, under the oath of the person constituting such company, if a person, or under the

oath of the president, secretary, treasurer, superintendent or chief officer of such association or corporation, if an association or corporation, make and file with the state auditor of this state a statement showing the total gross earnings received from all sources by such freight line companies within this state, for the year ending December thirty-first (31st) next preceding.

Gross earnings defined.—Sec. 4. The term "the total gross earnings received from all sources from the operation of such freight car lines within this state," as used in section three (3) of this act is hereby declared and shall be construed to mean all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of mileage over which such business is done, of earnings on all interstate business passing through, or into or out of the state.

State auditor to make draft for six per cent on gross earnings—Disposition.—Sec. 5. It shall be the duty of the state auditor on or before the fifteenth (15th) day of February of each year to make his draft on such freight line company as hereinbefore defined, for a sum in the nature of a tax at six per centum upon the gross earnings of such freight line company for the year ending the last day of December next preceding, as reported to the state auditor, and place the said draft in the hands of the state treasurer for collection; which shall be in lieu of all taxes upon all property of any freight line company so paying the same. All taxes collected by the state treasurer under the provisions of this act shall be paid into the state treasury and be credited to the general revenue fund.

Penalty for non-compliance—Provisions for enforcement.—Sec. 6. If any freight line company fails or refuses to pay said tax within thirty (30) days after a demand therefor shall have been made by the state treasurer, he shall thereupon add to the tax due a penalty of ten (10) per cent thereon for each subsequent month in which the tax remain unpaid; and if such taxes are not paid within sixty (60) days after demand therefor by the state treasurer he shall distrain sufficient goods and chattels belonging to such company charged with such taxes to be found within the State of Minnesota sufficient to pay the same, together with the penalty accrued thereon. The state treasurer shall immediately proceed to advertise in two (2) newspapers printed in the county of Ramsey, stating the time and place where the property will be sold, and if the taxes for which such property is distrained and the penalties accruing thereon are not paid before the time appointed for such sale, which shall not be less than ten (10) days after the taking of such property, the state treasurer or his deputy shall proceed to sell such property at such public vendue or so much thereof as will be sufficient to pay such taxes and penalties and costs of such distress and sale.

Sec. 7. This act shall take effect and be in force from and after its passage.

Approved April 20, 1911.

CHAPTER 253 OF THE GENERAL LAWS OF MINNESOTA FOR 1903.

An act providing for the taxation of railroad properties, the collection of such taxes and repealing acts inconsistent therewith.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Every railroad company owning or operating any line of railway situated within, or partly within, this state, shall during the year 1905, and annually thereafter pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state, owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four (4) per cent of the gross earnings derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grant shall be and remain exempt from taxation until sold or contracted to be sold, or conveyed, as provided in the respective acts whereby such grants were made or recognized.

SEC. 2. The term "the gross earnings derived from the operation of such line of railway within this state," as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within this state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all inter-

state business passing through, into or out of the state.

SEC. 3. All acts and parts of acts not inconsistent herewith regulating the payment, collection, time of payment, enforcement or reports involving the amount of taxes upon the gross earnings of railroad companies within this state, or providing penalties for the nonpayment of such taxes, are hereby made applicable to this act so far as may be; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 4. Upon the failure to pay the amount of such taxes legally due upon the date heretofore provided by law for the payment thereof, in addition to existing remedies, collection may be enforced in a civil action brought in the name of the State of Minnesota in the district court of any county.

SEC. 5. Before any railroad company shall be heard to contest or continue to contest the validity of this act or any part thereof, such railroad company shall as a condition precedent thereto, pay into the treasury of the State of Minnesota, the amount of taxes due or payable from such railroad company under the existing tax laws of this state applicable to such company.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 230. 32

THE CUDAHY PACKING COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota:

BRIEF OF DEFENDANT IN ERROR.

LYNDON A. SMITH,
Attorney General,
EGBERT S. OAKLEY,
Assistant Attorney General,
Attorneys for State of Minnesota.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 230.

THE CUDAHY PACKING COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota:

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

A Writ of Error brings to this Court the record of an action prosecuted to final judgment in Minnesota. State of Minnesota v. The Cudahy Packing Company, 129 Minn. 30.

The final judgment was to the effect that the plaintiff in error, a freight line company, must pay a tax for the years 1907 to 1912, each inclusive, upon its property in Minnesota, measured in 1907 and 1908 by 4 per cent, and in other years 6 per cent of its gross earnings. The state in support of its claim relies upon the following statutory provisions, viz: Chapter 250, Laws 1907, which defines freight line companies, requires annual reports of gross earnings to be made, defines such earnings and imposes a 4 per cent gross earnings tax on such freight line companies, which tax is in lieu of all taxes upon all property of such companies; Chapter 473 of the Laws of 1909, which changes the rate of tax from 4 per cent to 6 per cent; Chapter 377, Laws 1911, which defines freight line companies, fixes the situs of cars for taxation purposes, requires annual reports of gross earnings to be made, and imposes a 6 per cent gross earnings tax on such companies in lieu of all taxes upon all property of any freight line company so paying such tax. These laws are quoted in full at pages 87 to 93 of the brief of plaintiff in error.

According to the decision of the Supreme Court of Minnesota, construing the statutes of its own state, the plaintiff in error is a freight line company within the meaning of such statutes, insofar as its operation of the cars in question is concerned. The average number of cars per day operated by the Cudahy Company in Minnesota, the value of such cars, their earnings, and the average rate of taxation applicable to personal property throughout the state of Minnesota as a whole during the time in question, are covered by the stipulation of facts and will later be considered and discussed.

ARGUMENT.

Plaintiff in error objects to the right of the state to recover under these statutes on two grounds, to-wit: (A) Tax aims so directly at the receipts from interstate commerce as to be an unlawful burden upon such commerce; (B) Tax is not a fair equivalent for the ordinary property tax.

These objections will be taken up in their order.

A.

THIS TAX IS NOT AN UNLAWFUL BURDEN UPON INTERSTATE COMMERCE. IT IS [redacted] AN ORDINARY TAX, MEASURED BY GROSS EARNINGS, ASSESSED UPON REFRIGERATOR CARS HAVING A SITUS IN THIS STATE.

It heretofore has been contended in some cases by companies such as the plaintiff in error, that the imposition by a state of any tax on the instrumentalities used in interstate commerce, constituted an interference with that commerce, and was, therefore, in violation of the Federal Constitution. It was likewise contended that the imposing of a gross earnings tax was a direct burden upon the commerce itself and was not truly a property tax.

This Court in similar cases has decided such questions and the law appears to be well settled to the contrary.

In American Refrigerator Transit Co. v. Hall, 174 U. S., 70, 82, Mr. Justice Shiras, speaking for the Court, said:

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use

and employ a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and the individual items of property so used and employed were not continuously the same but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & Ohio Railroad, 127 U. S. 117; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

In the case of Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 153, Mr. Chief Justice Fuller stated:

"The case before us involves the taxation by the State of Utah of certain cars belonging to a corporation of Kentucky; the case cited (American Refrigerator Transit Co. v. Hall, supra) involved the taxation by the state of Colorado of certain cars belonging to a corporation of Illinois, and if this case comes within the rule laid down in that case, nothing further need be said."

In the United States Express Co. v. Minnesota, 223 U. S. 335, it was held that Minnesota might tax property used in interstate commerce within its borders, and that it might measure the value of such property by the gross receipts if the tax imposed was in lieu of all other taxes upon the property of such Express Company. At page 348, Mr. Justice Day, speaking for the Court, said:

"We think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which

> could not, in itself be taxed, and does not fall within that class of statutes uniformly condemned in this Court which shows a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state."

The statutes heretofore referred to are three of a series of gross earnings statutes, providing for a method of taxation of certain instrumentalities of commerce, whose situs is not strictly in any locality but rather of a varying and state wide character. Other properties in Minnesota measured for taxation by the gross earnings method, are those of railroads, express companies, sleeping car companies, telegraph companies and telephone companies.

Minnesota G. S. 1913, Sections 2226 to 2267.

B.

THE TAX IS A FAIR EQUIVALENT FOR THE ORDINARY PROPERTY TAX.

Section 1, of Article 9 of the Constitution of Minnesota, in part, reads as follows:

> "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform *on the same class of subjects* and shall be levied and collected for public purposes * * *."

In Home Insurance Co. v. New York, 134 U. S. 594, Mr. Justice Field, speaking for the Court relative to the Fourteenth Amendment, at page 606, said:

> "But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and between

real and personal property. Nor does the amendment prohibit special legislation."

In Pacific Express Co. v. Seibert, 142 U. S. 339, 351, Mr. Justice Lamar stated:

"This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.

"The rules of taxation, in this respect, were well stated in the opinion of the court, delivered by Mr. Justice Bradley, in Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 237, as follows: 'The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. * * * It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation.'"

The State Legislatures, having the power of classification, have also the power to select the differences on which to base the classification. States are not bound to rigid equality by the equal protection provision of the Fourteenth Amendment. The classification simply must not be exercised in clear and hostile discrimination between particular persons and classes. In taxation there is a broader power of classification than some other exercises of legislation. There is no general supervision on the part of the Federal Government over state taxation. The state, speaking generally, has the freedom of a sovereign, both as to objects and immunities. It is enough that there is no discrimination in favor of one against another of the same class. Citizens Telephone Co. v. Fuller, 229 U. S. 322, and cases cited.

There is nothing in the Federal Constitution which prevents the state from singling out railroad and other corporate property and taxing it in a manner and at a rate different from that applicable to other property. Michigan Central Ry. Co. v. Powers, 201 U. S. 245.

The reasonableness of a tax, unless some Federal right be violated, is within the discretion of the State Legislature.

The claim of the defendant that the gross earnings tax is not a fair equivalent of a tax upon the cars themselves, is wholly untenable.

Assuming for the purpose of argument that this gross earnings tax was in lieu of the tax only upon the freight cars of the defendant, the figures on their face would not show such a manifest inequality and injustice as to furnish evidence that equality had not been sought for, or

that the Legislature had intended oppression and confiscation instead of taxation. Figuring an ad valorem tax on the value of these cars at the average rate throughout the state on personal property, and adding 10% penalty for non-payment, we would have an aggregate tax of about $1,700 instead of $2,100 sued for herein.

The stipulation of facts while conceding the average tax rate on personal property, shows that there was no uniformity of tax rate throughout the state, and that in some entire counties the tax rate was as high as 61 mills—and in some local taxing districts, over 200 mills.

There is no showing in this case that the property of this defendant was equally distributed throughout the state in all of the taxing districts. The evidence is actually to the contrary, and that not more than one-third of the counties in the State were ever traversed by a Cudahy car.

The counties or local taxing districts in which the tangible property was regularly and habitually found may have actually had a much higher annual tax rate than the average throughout the state. It is well known that municipal taxation is always higher than rural and these cars would each have had, if subject to ad valorem taxation, a situs in the municipalities.

Perfect equality in the assessment of taxes may always be in the aim of statutes, but it is never the actual result. Courts are slow to say that because the actual result is not perfect or even approximate equality that the Legislature must conclusively have intended inequality. Mr. Justice Brewer, in Michigan Central Railroad Company v. Powers, 201 U. S. at page 292, said:

> "We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation; and in respect to the latter, the state has, speaking generally, the freedom of a sovereign both as to objects and methods."

The Legislature might reasonably classify the property of freight line companies for taxation purposes, and provide a different system of taxing their property than that applied to any other property in the state. The nature of its property and the character of its use are so inherently different as to form a reasonable basis for classification.

Kentucky Railroad Tax Cases, 115 U. S. 321.

McHenry v. Alford, 168 U. S. 651.

In Michigan Central R. R. v. Powers, supra, at page 302, Mr. Justice Brewer said:

> "It may also be said that a Legislature is not bound to impose the same rate of a tax upon one class of property that it does upon another. As it may exempt all of one class so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them."

Section 1 of the 1907 law provides that the payment of the tax therein imposed "shall be in lieu of all taxes upon *all property* of any freight line company so paying the same," and the same words are to be found in section 5 of the 1911 law.

The following table throws a volume of light upon the fairness of the tax levied:

Year	Number of Cars	Value of Cars	Annual gross Income	Per cent of Income to capital
	(Trans of R. p. 8)	(Trans. of R. p. 7)	(Trans. of R. p. 5)	(computed)
1907	10	$9,000	$5,562.98	62
1908	11	9,900	6,416.19	65
1909	12	10,800	7,236.00	67
1910	12	10,800	7,056.75	65
1911	12	10,800	7,159.96	66
1912	12	10,800	7,019.25	65

The average per cent of income to car values for the time in question is 65. In 1907 the gross earnings from one car valued at $900.00 were $556.29, or approximately 62 per cent. The state has a right to tax all of the property, tangible and intangible, to tax the freight line company as a going concern and to consider that the intangible property follows the tangible as the shadow does the substance. Can any one seriously contend that a $900.00 car, which is operated by a going concern and produces annually between $556.00 and $603.00, does not reflect a very great intangible value?

Plaintiff in error has not shown how much of this income is offset by expense of repairs for cars and allowance for depreciation. We believe it to be a matter of judicial knowledge that these expenses are relatively small and the state is willing to admit that the average recognized rate

of depreciation is 3.6 per cent annually, outside of repairs. The repairs in this case are only partially a burden on plaintiff in error.

> "All repairs made by any railroad company on the cars of the defendant while in its possession are charged by said repairing company to the defendant and are paid for by the defendant, except where such repairs are made necessary by negligent handling of the cars by the railroad company." (Trans. of record, folio 29.)

In Adams Express Company v. Ohio, 165 U. S. 194, 220, Mr. Chief Justice Fuller stated:

> "As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several states through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction. (Citing cases.) The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the roailroad company; or the cars of the sleeeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation."

In Adams Express Company v. Ohio, 166 U. S. 185, 223, 225, Mr. Justice Brewer, speaking for the court, said:

> "But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its

business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle. * * *

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about situs should interfere to enable these large corporations, whose business is carried on

through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

CONCLUSION.

The constitution and statutes of Minnesota have always contemplated that all property within the state shall bear its just burden of taxation.

Article 1, of the original constitution, provided:

> "Laws shall be passed taxing all moneys, credits, investments and bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money."

The constitutional tax amendment contemplates the taxation of all property except what is therein expressly exempted.

Section 1 of Article 9, so far as here material, reads as follows:

> "The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities and all seminaries of learning, all churches, church property, and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose shall be exempt from taxation. * * *"

Minnesota General Statutes 1913, section 1969, reads as follows:

> "All real and personal property in this state and all personal property of persons residing therein, includ-

ing the property of corporations, banks, banking companies and bankers, is taxable, except such as is by law exempt from taxation."

The line of refrigerator cars of plaintiff in error and its branch houses which are used in part in the operation of such cars in the freight line business are unquestioned subjects of taxation. The intangible property of such freight line company which it has by virtue of its affiliation and valuable contracts with railroad companies, as well as the intangible value which has inured to the plaintiff in error through management and conduct of its refrigerator line, tend both to enhance the value of its property for taxation and fortify the right of the state to measure the taxation by gross earnings derived by combination of such tangible and intangible property in a going concern. The statutes provide for definite, reasonable and legitimate methods for determining the rate of taxation of all such property within Minnesota.

These statutes have operated in this instance so as to produce a tax neither burdensome to interstate commerce nor unfair to plaintiff in error.

Respectfully submitted,

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CUDAHY PACKING COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 32. Argued April 26, 1917.—Decided April 15, 1918.

In so far as the property, tangible and intangible, constituting a freight car line, is regularly and habitually used or employed in a State, it is within the taxing power of that State although chiefly devoted or applied to interstate transportation, and may be taxed at its real value as part of a going concern.

In determining whether a state tax is to be viewed as a tax on property measured by earnings or a tax on earnings, the view of the state court and legislature, though not conclusive, will not be rejected by this court unless ill founded.

Under a law of Minnesota, part of a general system applied to railroads, telephone lines, etc., a company owning freight cars which it furnished to railroads for a fixed compensation per mile of travel and which were employed by the railroads within and without the State in hauling both interstate and intrastate commerce, was taxed at a stated per cent. of its gross earnings from the mileage within the State, in lieu of other taxes on the property so engaged, the tax being treated by the state court and legislature as a property tax, and not being in excess of what would be legitimate as an ordinary tax on such property, tangible and intangible, taken at its real value as part of a going concern. *Held*, that the tax was a property tax, not a tax on gross earnings burdening interstate commerce, and was not distinguishable from the tax sustained in *United States Express Co.* v. *Minnesota*, 223 U. S. 335.

Held, further, that the tax was not to be deemed double or excessive from the fact that the receipts of the railroads from shipments in these cars, less the rental paid to the company, were made a factor in valuing the property on which the railroads were taxed.

129 Minnesota, 30, affirmed.

THE case is stated in the opinion.

Mr. Robert E. Olds, with whom *Mr. Frank B. Kellogg*, *Mr. Cordenio A. Severance* and *Mr. Thomas Creigh* were on the brief, for plaintiff in error.

Mr. Lyndon A. Smith, Attorney General of the State of Minnesota, with whom *Mr. Egbert S. Oakley*, Assistant Attorney General of the State of Minnesota, was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A tax, for each of the years 1907 to 1912, inclusive, imposed under a law of Minnesota (Acts 1907, c. 250; 1909, c. 473; 1911, c. 377) against the Cudahy Packing Company as a freight line company, and sustained by the Supreme Court of the State (129 Minnesota, 30), is here in question. Whether the tax constitutes an unconstitutional restraint or burden on interstate commerce is the matter for decision.

The company is an Illinois corporation and operates plants in Iowa, Missouri and Nebraska for slaughtering live stock and converting the same into fresh meats and other articles of commerce. It sells the products throughout the United States, maintains branch houses in several States, including three in Minnesota, and owns a line of refrigerator cars wherein the products are shipped to the branch houses and places of consumption. Under a contractual arrangement it supplies these cars to the railroads for use in such transportation and receives therefor a fixed compensation per mile of travel. In the territory embracing Minnesota this compensation or rental is one cent per mile whether the cars be loaded or empty. Usually the cars are moved to particular destinations with loads of the company's products and are returned empty to be loaded again, but where it is practicable to do so the railroads are free to carry other freight in them on the

return trip. The company pays the usual tariff rates for the transportation of its products, just as though the railroads owned the cars, and also bears the expense of all repairs save such as become necessary through negligent handling by the railroads. The use made of the cars in Minnesota consists in transporting the company's products (a) across the State from points without on one side to points without on another, (b) from points without to points within the State and the reverse, and (c) between points within the State. Of their total mileage in the State 90 per cent. is in interstate and 10 per cent. in intrastate transportation. The average number of cars in the State per day ranges from 10 to 12.

The cash value of each car, as a separate article of tangible property, is from $700 to $900, and the intangible property incident to their combined use under the contractual arrangement with the railroads is also, as the record shows, of substantial value. The tax in question is all that is assessed against the company in respect of the cars or the intangible property. It has other tangible property in the State, not part of its car line, whereon it pays the usual local taxes.

The receipts of the railroads from shipments carried in these cars in Minnesota, less the compensation or rental paid to the company, are added to the other gross earnings of the railroads from business in the State and the total is taken as the value for purposes of taxation of the property which the railroads own or operate in the State for railway purposes.

As construed and applied by the state court, the Minnesota law requires a freight line company, meaning a company furnishing or leasing cars to railroads for freight transportation, to report annually its gross earnings from the operation of its car line within the State and to pay, in lieu of other taxes on the property so employed, a tax fixed at a stated per cent. of such earnings. That court

holds that this law is an exertion of the power of the State to tax the property within its limits from which the earnings are derived and is intended to embody a practical method of reaching and valuing that property, tangible, and intangible, for taxing purposes.

In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the State, although chiefly devoted or applied to interstate transportation. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *s. c.*, 166 U. S. 185; *American Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* v. *Lynch*, 177 U. S. 149. This is not questioned; but it is insisted that the tax imposed is not a property tax but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, "by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack" as restraining or burdening such commerce. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191

U. S. 379, 387; *Fargo* v. *Hart*, 193 U. S. 490, 499; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas, supra.*

As before stated, the state court regards the tax as imposed in respect of the property rather than the earnings, and the same view seems to be taken by the legislature, for the Act of 1909 speaks of the tax as "a tax upon its [the company's] property" and the Act of 1911 says "the value of such property [that used within the State] for purposes of taxation is to be determined" by reference to the gross earnings from the mileage within the State. True, this local view is not conclusive on this court, but it cannot be rejected unless it can be said to be ill founded.

The question of the nature and effect of taxes more or less like this has been repeatedly considered in this court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled it has not been easy to apply them to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent. of the gross receipts of an express company doing both a local and an interstate business in that State. The statute called the tax a "gross revenue tax" and declared that it was to be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets" of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the State was to be reached and valued in another way. The other case involved a tax in Minnesota of a desig-

nated per cent. of the gross earnings of an express company from business done in that State, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the State as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the State.

The law imposing the present tax is closely patterned after the one exacting the tax upheld in *United States Express Co.* v. *Minnesota*, and contains the same declaration that the tax shall be in lieu of other taxes on the property. The statutes differ only in minor details and are both parts of a general system which the State applies to railroads, telephone lines and the like. So, unless this tax be otherwise distinguishable, it must, under the decision in that case, be regarded as a property tax and not as laid on the gross earnings.

Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax

on the property. But the contention proceeds on an erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value.

Because the receipts of the railroads from shipments in these cars, less the rental paid to the company, are made a factor in valuing for taxation the property on which the railroads are taxed, it is contended that the cars are taxed twice, once to the company and again to the railroads, and are excessively valued. The contention apparently assumes that the receipts from such shipments arise solely from the use of these cars, whereas they arise in part from the use of the tracks, locomotives, fuel, labor and the like provided by the railroads. Not improbably only a minor part is fairly attributable to the use of cars. In any event, the company has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the State values it for that purpose by the rental received. In valuing the property on which the railroads are taxed the amount of the rental is deducted from their earnings. This plainly discloses a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns.

We think the tax is not distinguishable from that sustained in *United States Express Co.* v. *Minnesota.*

Judgment affirmed.